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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ESTATE OF DOROTHY MARTIN,
Petitioner,

v.

CALIFORNIA DEPARTMENT OF VETERANS AFFAIRS, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether outright exclusion of a class of otherwise qualified disabled individuals from a federally-subsidized, state program violates the Equal Protection Clause, Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, where the asserted purpose of the exclusion is the preservation of the program's resources.

2. Whether "motivating factor" is the proper causal standard in cases brought under the Americans with Disabilities Act and the Rehabilitation Act.

3. Whether the Court of Appeals erred in failing to consider undisputed evidence that established liability as a matter of law.

4. Whether California's statute barring deceased plaintiffs from recovering damages for pain and suffering applies to federal claims under 42 U.S.C. § 1983, the Americans with Disabilities Act and the Rehabilitation Act.

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiffs-Appellees and Petitioner: Estate of Dorothy Martin, Mary Martin.

Defendants-Appellees and Respondents: California Department of Veterans Affairs, a California Public Corporation; Bruce Thiesen, Individually and as Secretary of the California Department of Veterans Affairs; George H. Andries, Jr., Individually and as Deputy Secretary for Veterans Homes; Marcella McCormack, Individually and as Administrator of Veterans Home of California, Yountville; John Heltsley, Individually and as Administrator of Veterans Home of California, Barstow; and Tom Arnold, Individually and as Administrator of Veterans Home of California, Chula Vista.

CORPORATE DISCLOSURE STATEMENT

California Department of Veterans Affairs is a public corporation pursuant to California Military & Veterans Code § 694. California Department of Veterans Affairs is a political subdivision of the State of California.

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PETITION FOR A WRIT OF CERTIORARI

The Estate of Dorothy Martin respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on March 26, 2009 and is reported at *Estate of Martin v. Cal. VA*, 560 F.3d 1042 (9th Cir. Cal. 2009). The Ninth Circuit denied a request for rehearing on May 6, 2009.

The Ninth Circuit affirmed the October 21, 2005 judgment of the United States District Court for the Eastern District of California.

JURISDICTION

Petitioner seeks review of the judgment of the U.S. Court of Appeals for the Ninth Circuit, which was entered on March 26, 2009. The Ninth Circuit denied a request for rehearing on May 6, 2009. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.3 because it is being filed within 90 days of entry of the Ninth Circuit's order denying rehearing. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional provision involved in this matter is the Fourteenth Amendment to the United States Constitution, U.S. Const. Amend. 14, §1, reproduced in Appendix E. The relevant statutory provisions include Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, 42 U.S.C. § 1983, 42 U.S.C. § 1988, and California Code of Civil Procedure § 377.34. The relevant statutory and regulatory provisions are reproduced at Appendices F and G, respectively.

STATEMENT OF THE CASE

Petitioner Estate of Dorothy Martin claims that Respondents California Department of Veterans Affairs and its officers (collectively "Department") impermissibly barred Martin's admission to the Veterans Home of California ("Home") because of her disability (severe dementia), in violation of the Americans with Disabilities Act ("ADA"), the Rehabilitation Act, and the Equal Protection Clause. The Department denies liability, contending that it excluded Martin to preserve resources.

The Home is a program of long-term care, operated by the Department for the benefit of aged and disabled veterans. *See* Cal. Mil. & Vet. Code § 1012(a). The Home's mission is "to assur[e] that veterans . . . are provided care and support as the need develops."[1]

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[1] See Excerpts of Record ("E.R.") at 486.

The Home's Dementia Policy

The Ninth Circuit panel held that Martin was otherwise qualified for admission to the Home. Appendix, p.10a. Nevertheless, although Martin sought admission from April 1998 through November 2001, she was not admitted. The Home's documented reason for Martin's denial stated, "Applicant has mod-severe dementia so per Cal Vet Board policy C-2 # 6 unfortunately we must deny."[2]

California Veterans Board Policy is the Home's official policy. Section C-2 # 6 states, "[t]he veterans homes will not admit [a]pplicants with dementia or other confusional states who require a secure environment or other special care."[3] The Department concedes that Martin was denied admission on the basis of that policy.[4] The Department also concedes that had Martin not had severe dementia when she applied, she would have been admitted.[5]

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[2] See E.R. at 353. The reason was also documented elsewhere as "severe dementia."

[3] See E.R. at 373.

[4] See E.R. at 40.

[5] "Assuming [Dorothy] was otherwise self-sufficient, she would, more likely than not, have been admitted to the Dom or the ICF", See E.R. at 229; "[i]t is equally obvious that, had Dorothy Martin applied for admission to the Veterans Home when she could adequately care for herself at either the domiciliary (Dom) level of care or the intermediate level of care (ICF), she would likely have been admitted", See E.R. at 227.

The Department testified that it applies Policy C-2 # 6 "as it is stated,"[6] and the Home's denial lists show that the Department has a pattern and practice of doing exactly that. The denial lists repeatedly show Alzheimer's/dementia[7] as the reason for denial.[8] Notably, qualified applicants without disabilities, or with only physical disabilities, are never listed as denied for *any* reason.[9] "Insufficient resources" is also *never* listed as a reason for denial.[10]

Despite the admissions policy, Home members develop dementia after admission, and the Home routinely provides care for them, in secure environments if necessary.[11] The Home has a sizeable population with significant cognitive impairment or dementing illnesses.[12] The Department concedes that had Martin been admitted to the Home before her dementia developed, she would have received the dementia care she required.[13]

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[6] See E.R. at 427.

[7] Mental illness, the other excluded disability, also appears in the denial statistics.

[8] See E.R. at 366; 370-371; 368.

[9] See E.R. at 366; 370-371; 368.

[10] See E.R. at 366; 370-371; 368.

[11] See E.R. at 428, 436-437, 444, 467.

[12] See E.R. at 432.

[13] "Had Dorothy Martin developed the disability which qualifies her under the ADA and Rehabilitation Act after her admission to

The Home's Resources

The Home's financial resources increase as its residency increases. Each veteran in the Home pays a member fee, and those in the higher care levels pay a higher fee. *See* Cal. Mil. & Vet. Code § 1012.3. In addition, the U. S. Department of Veterans Affairs (VA) pays the Home a substantial per diem for each veteran in the higher care levels. *See* 38 C.F.R. § 51.40. The Home also receives funding from Medicare, Medicaid, and the VA Aid and Attendance allowance (*see* Cal. Mil. & Vet. Code § 1012.2).[14] As one Home administrator testified, "[t]he more beds I fill the more money I get."[15]

Although the Home must give priority to wartime veterans over peacetime veterans and non-veteran spouses (*see* Cal. Mil. & Vet. Code § 1012), 22 peacetime veterans and 11 non-veterans were admitted[16] during the time that Martin, a wartime

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any of the Veterans Homes, it is likely she would have been provided the SNF care she required", see E.R. at 125; "Veterans Homes provide for members with Alzheimer's disease and or other forms of dementia in some cases more severe than Dorothy Martin", see E.R. at 128; "Had Dorothy Martin been a member of a home at the time she required SNF care, she would have received it", see E.R. at 233.

[14] See E.R. at 559.

[15] See E.R. at 559.

[16] Compare 3 peacetime veterans and 63 non-veterans in April 1998 to 25 peacetime veterans and 74 non-veterans in November 2001. Compare E.R. at 377 with 420.

veteran,[17] was denied admission. The non-veterans actually consume *more* resources than veterans because the Home does not receive Federal VA support for their care.[18]

Procedural History

Martin's Estate filed this suit in October 2002, and the matter went to jury trial in October 2005. During trial, both Petitioner and Respondents moved for judgment as a matter of law. The Court denied Petitioner's motion, granted Respondents' motion in substantial part, and submitted a single combined ADA/Rehabilitation Act claim to the jury. The jury found in favor of Respondents, and judgment was entered on October 21, 2005.

Petitioner filed a timely notice of appeal on September 29, 2006. The Ninth Circuit's affirmed the lower court's judgment in an opinion issued on March 26, 2009. Petitioner filed a Request for Panel Rehearing and Rehearing *En Banc* on April 9, 2009. On May 6, 2009, the Ninth Circuit denied the Petitions for Rehearing.

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[17] The Parties stipulated that Martin was a wartime veteran. See E.R. at 75.

[18] See E.R. at 43.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit panel's opinion stabs at the very heart of the ADA, the Rehabilitation Act, and the Equal Protection Clause. If allowed to stand, the opinion would permit state and federally-funded programs to evade their Constitutional and statutory obligations not to exclude the disabled by merely claiming insufficient funds.

The panel upheld the Department's admissions policies on the basis that they "simply reflect the unfortunate fact that a facility with limited resources cannot serve every disabled individual who needs care." Appendix, p. 14a. The panel then held that the Department "made decisions on the permissible basis of the availability of adequate resources to care for an individual applicant, not on the impermissible basis of disability discrimination." *Id.*

Respectfully, the panel is incorrect. "Inadequate resources for certain applicants" is nothing more than a euphemism for arbitrary discrimination. The panel's holding starkly conflicts with this Court's precedents, Ninth Circuit and Second Circuit precedent, and the plain language of the ADA and Rehabilitation Act.

I. THE NINTH CIRCUIT'S HOLDING IMPROPERLY PERMITS STATES TO EXCLUDE THE DISABLED FROM ITS PROGRAMS IN ORDER TO PRESERVE FUNDS

First and foremost, this Court should grant review because the Ninth Circuit panel's opinion is fundamentally irreconcilable with prior Supreme

Court decisions in similar equal protection cases. This Court has repeatedly and emphatically held that a state's desire to preserve resources is not, by itself, a rational basis for excluding select classes:

> Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources.

Plyler v. Doe, 457 U.S. 202, 227 (1982) (*citing Graham v. Richardson*, 403 U.S. 365, 374-375 (1971)).

> The State must do more than justify its classification with a concise expression of an intention to discriminate.

Plyler, 457 U.S. at 227, *citing Examining Bd. v. Flores de Otero,* 426 U.S. 572, 605 (1976).

> [A State] may legitimately attempt to limit its expenditures . . . . But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . The saving of welfare costs cannot justify an otherwise invidious classification.

Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

The panel's opinion in this case allows that which this Court expressly forbids: Exclusion of applicants with severe dementia, justified by nothing more than "a concise expression of an intention to discriminate." *See Plyler, supra.*

The panel's opinion also conflicts with this Court's precedent in a Rehabilitation Act case. In *Alexander*

v. Choate, 469 U.S. 287, 301 (1985), this Court held that a state may not define its programs "in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled." *Id.* A state must provide otherwise qualified disabled applicants "meaningful access to the benefit the grantee offers." *Id.* In this case, the Department has impermissibly redefined a program for the aged and disabled as a program for "the aged and disabled, except for certain disabilities." The benefit the program offers is life-long care, including severe dementia care, but otherwise qualified applicants with severe dementia are not provided *any* access to that benefit.

The panel's opinion also conflicts with Ninth Circuit precedent explicitly holding that the ADA and Rehabilitation Act absolutely prohibit exclusion of the disabled in order to preserve resources. *See Lovell v. Chandler*, 303 F.3d 1039, 1055 (9th Cir. 2002). The *Lovell* panel held that eligibility criteria that excluded disabled individuals from coverage under a Hawaiian healthcare program were facially discriminatory and unlawful as a matter of law, rejecting Hawaii's proffered defense of a "financial necessity" to exclude the disabled. *See Lovell*, 303 F.3d at 1055, 1057-58. The *Lovell* court explained that the State may not exclude disabled applicants "unless it provides them with benefits 'as effective as those provided to others.'" *Lovell*, 303 F.3d at 1055, *citing* 28 C.F.R. § 35.130(b)(1)(iv); 28 C.F.R. § 41.51(b)(1)(iv). In this case, like in *Lovell*, the unacceptable alternative benefit provided to Martin was "no benefit at all." *See Lovell, supra*.

The panel opinion impermissibly permits the Department to justify deliberate exclusion of otherwise qualified disabled veterans by merely alleging a concern for the preservation of resources, and accepts as "rational" the Department's "concise expression of [its] intention to discriminate." To preserve the meaning and intent of the Equal Protection Clause, the ADA and the Rehabilitation Act, the opinion must be overturned.

II. THE NINTH CIRCUIT FAILED TO PROPERLY APPLY A RATIONAL BASIS REVIEW

The Equal Protection Clause requires that a state program provide all persons within the same classification an equal opportunity to obtain the program's benefits and services, and it requires that the classification itself have (at least) a rational basis that advances a legitimate legislative purpose. "In applying the Equal Protection Clause to most forms of state action, [courts should] seek . . . the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." *Plyler*, 457 U.S. at 216. The Ninth Circuit panel in this case failed to properly apply this rational basis analysis.[19]

The panel concluded that the Department's practice of excluding disabled applicants "is rationally related to the goal of providing life-long care to as large a

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[19] As discussed in Section III, infra, Petitioner contends that heightened scrutiny is appropriate in cases involving exclusion of persons with disabilities. Both the District Court and the Court of Appeals rejected that contention.

group as possible, given limited resources and a huge population of potentially eligible California veterans." Appendix, p. 16a. However, a proper rational basis analysis would show that denying benefits to *any* group of veterans *defeats*, rather than advances, that goal. Moreover, even if excluding *some* veterans might somehow advance that goal, the panel nevertheless failed to articulate any rational basis for excluding *those particular applicants* with severe dementia. The Department could just as easily — and just as arbitrarily — have selected a different category of applicants to exclude. The "rational" element in the panel's "rational basis" analysis is entirely missing. Moreover, there is no evidence supporting the panel's apparent conclusion that withholding benefits from veterans with severe dementia actually increased the overall number of veterans who received life-long care.

The policy and practice of denying admission to disabled veterans with a specific disability clearly fails to advance the stated purpose of the Home — to provide care for aged and disabled veterans. Instead, that purposed is *defeated* with respect to the disabled veterans who are denied care. Denying benefits to a program's intended beneficiaries utterly fails the rational basis test.

It should be clear, especially in light of the ADA and the Rehabilitation Act, that there is no rational basis for intentionally excluding the disabled from a state program intended to serve the "aged and disabled." The panel's holding that "the Department's admission policies pass constitutional muster" (Appendix, p. 15a) is erroneous and must be overturned. This Court should conclude that the Department's admissions policies and practices are

arbitrary, discriminatory, and violate Equal Protection as a matter of law.

III. THE NINTH CIRCUIT SHOULD HAVE APPLIED HEIGHTENED SCRUTINY TO THE DEPARTMENT'S ADMISSIONS POLICIES

Even were the panel's rational basis analysis correct, the panel nevertheless should have applied a heightened level of scrutiny to the Department's admissions policies that intentionally and categorically exclude the disabled.

In selecting "rational basis" as the appropriate level of judicial review, the panel relied upon *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-43 (1985), a case that predates the enactment of the ADA. *See* Appendix, p. 15a (*citing Cleburne,* 473 U.S. at 442-43).

This Court noted in *Cleburne* that the mentally retarded were a large and diversified group and "doubted" that they would be entitled to heightened scrutiny. *See Cleburne,* 473 U.S. at 442-43. However, in enacting the ADA after the *Cleburne* decision, Congress specifically declared the disabled to be "a discrete and insular minority who have been . . . subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals." 42 U.S.C. § 12101(a)(7). According to this Court's own standards, such a classification is generally treated as "suspect" and is entitled to a heightened level of scrutiny. *See Plyler*, 457 U.S. at 216-219.

Therefore, since Congress has resolved the "doubt" expressed by this Court in *Cleburne*, this Court should revisit the appropriate level of scrutiny for disability cases, particularly where the disabled are intentionally excluded from a state program, and should hold that the disabled are a protected class entitled to heightened scrutiny.

IV. UNDISPUTED EVIDENCE CONCLUSIVELY ESTABLISHES THAT MARTIN WAS EXCLUDED BECAUSE OF HER DISABILITY.

The panel held that "Dorothy was denied admission because none of the facilities had adequate resources to be able to care for her properly, not because of her disability." Appendix, p. 13a. This finding failed to consider the undisputed and overwhelming documentary evidence that Dorothy Martin was, indeed, denied admission precisely because of her disability.

The ADA and Rehabilitation Act prohibit a state (ADA) or federally-assisted program (Rehabilitation Act) from excluding otherwise qualified disabled individuals because of their disabilities. 42 U.S.C. § 12132; 29 U.S.C. § 794(a). In this case, the parties stipulated that the Department is subject to the ADA and Rehabilitation Act, and that Martin's severe dementia is a disability within the meaning of those Acts.[20] The Ninth Circuit panel concluded that Dorothy Martin was otherwise qualified for admission to the Home. Appendix, p. 10a. The determinative

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[20] See E.R. at 76.

question, then, was whether she was excluded because of her disability.

She was. Martin was denied admission because she had severe dementia.[21] Severe dementia is a disability. Therefore, Martin was denied admission because of her disability. The Department testified that the policy categorically excluding applicants with Martin's disability is applied "as it is stated," and the Department admits that the policy was applied to Martin[22], precisely as their documentation indicates. Moreover, the Department conceded that had Martin not been disabled, she would have been admitted.[23] In *Lovell*, the Ninth Circuit concluded that such a statement meant that disability was the *sole* reason for exclusion:

> When viewed in relation to similarly situated nondisabled individuals, those disabled persons were denied QUEST coverage by the State solely because of their disabilities; that is, had they been nondisabled, they would have received . . . coverage.

Lovell, 303 F.3d at 1053. The ADA and Rehabilitation Act do not provide a financial (or any) defense to outright exclusion of the disabled. Accordingly, the undisputed evidence alone should have enabled Plaintiffs to prevail as a matter of law, and the panel's

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[21] See E.R. at 353 ("mod-severe" dementia); E.R. at 355, 364, 370-71 ("severe dementia").

[22] See E.R. at 40.

[23] See E.R. at 229, 227.

holding to the contrary should be corrected by this Court.

V. THE LOWER COURTS' APPLICATION OF "SOLE" CAUSATION CONFLICTS WITH NINTH CIRCUIT PRECEDENT AS WELL AS THE "SUBSTANTIAL FACTOR" TEST APPLIED BY THE SECOND CIRCUIT

The District Court applied too strict a causal standard for the ADA and Rehabilitation Act, in conflict with existing Ninth Circuit precedent and also with the standard applied by the Second Circuit Court of Appeals. The panel opinion did not overrule this serious error of law. This Court should clarify the proper causal standard in ADA and Rehabilitation Act cases in order to avoid a conflict between the Circuits on this important federal issue.

The District Court's jury instructions required disability to be the "sole" cause of Martin's exclusion, requiring the jury to find for the Department if it found that the Department was motivated by any reason in addition to disability, including the reason of funding preservation.[24] That instruction was inconsistent with *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053, 1063-1065 (9th Cir. 2005), in which another Ninth Circuit panel held that "motivating factor" is the only proper standard under the ADA. *Id.* The instruction also conflicted with a Second Circuit case, in which "substantial" factor was the standard applied under both the ADA and Rehabilitation Act. *See*

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[24] *See* E.R. at 154.

Henrietta D. v. Bloomberg, 331 F.3d 261, 291 (2nd Cir. 2003).

The "sole" causation standard applied by the lower courts in this case cannot be reconciled with *Head* or *Henrietta D.* In addition, since every program would undoubtedly like to preserve its resources, Congress could not have intended that merely asserting the additional motive of saving money could defeat an ADA or Rehabilitation Act claim. However, that is precisely the effect of the District Court's holding in this case.

Imposing the sole-causation standard, compounded with the error of considering resource preservation to be a legitimate reason to exclude Martin, virtually compelled the jury to find for the Department. The existence of the impermissible motive of Martin's disability as a motivating factor should have been sufficient for a finding of liability. Accordingly, the verdict must be overturned.

VI. DISALLOWING DAMAGES FOR PAIN AND SUFFERING TO DECEASED PLAINTIFFS IS HOSTILE TO THE REMEDIAL SCHEMES OF 42 U.S.C. § 1983, THE AMERICANS WITH DISABILITIES ACT, AND THE REHABILITATION ACT

The District Court held, and the Court of Appeals affirmed (Appendix, p. 17a), that Martin's Estate was not entitled to recover damages for pain and suffering for her federal claims because California law does not permit awards of damages for pain and suffering to deceased plaintiffs. *See* Cal. Code Civ. Proc. § 377.34.

This ruling was incorrect, against the great weight of authority, and must be reversed.

Where federal law is silent, state law generally controls. *See* 42 U.S.C. § 1988. However, state law does not control where, as here, it is inconsistent with federal law and policy. *Id.*

"[A] proper remedy for an unconstitutional exclusion [] aims to 'eliminate [so far as possible] the discriminatory effects of the past' and to 'bar like discrimination in the future.'" *United States v. Virginia,* 518 U.S. 515, 547 (1996), (*quoting Louisiana v. United States,* 380 U.S. 145, 154 (1965)). An award which includes a significant amount for pain and suffering is more likely to deter the Department from denying benefits to qualified veterans in the future. Compensatory damages alone are unlikely to be a sufficient deterrent. It must be made substantially more expensive for the Department to violate the law than to obey it.

This Court narrowly held that Louisiana's survival law was not hostile to federal law, relying heavily on the fact that Louisiana permits survival of emotional distress damages when a plaintiff is survived by close relatives. *See Robertson v. Wegmann,* 436 U.S. 584, 592 n.8 (1978). However, unlike the Louisiana statute at issue in *Robertson*, California's statute does not permit survival of damages for pain and suffering under any circumstances. *See* Cal. Code Civ. Proc. § 377.34.

Also unlike the Louisiana case, it is highly likely that the Department's behavior would be influenced by California's survivorship provisions. Because

Alzheimer's patients tend to be elderly, and because Alzheimer's is a fatal disease,[25] the Department had the ability "deliberately to select as victims persons who would likely die before conclusion of the 1983 suit," *Robertson*, 436 U.S. at 592, n.10, and exclusion from the Home would not likely itself cause the plaintiff's death (assuming services were obtained elsewhere).

Dementia patients have been explicitly targeted for exclusion by the Department since 1973.[26] The Department must be deterred from continuing along that path. Martin's Estate must be permitted to recover damages for pain and suffering along with its other damages in order to create suitable and sufficient deterrence.

The weight of authority within the Ninth Circuit is that emotional distress damages do survive in § 1983 actions. *See, e.g., Garcia v. Whitehead,* 961 F. Supp. 230, 233 (C.D. Cal. 1997); *Gutyon v. Phillips,* 532 F. Supp. 1154, 1166 (N.D. Cal. 1981); *Williams v. City of Oakland,* 915 F. Supp. 1074, 1078-79 (N.D. Cal. 2002); *Davis v. City of Ellensburg,* 651 F. Supp. 1248, 1256 (E.D. Wash. 1987). Judge Patel's opinion in *Williams* notes that both the Tenth Circuit and the Seventh Circuit also permit survivorship of emotional distress damages in § 1983 claims. *Williams, supra,* at 1079, *citing Berry v. City of Muskogee,* 900 F.2d 1489, 1054-06 (10th Cir. 1990); *Bell v. City of Milwaukee,* 746 F.2d 1205, 1234-42, 1250-53 (7th Cir. 1984). Again, if this

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[25] *See* E.R. at 507.

[26] *See* E.R. at 373.

Court does not reverse, it will create a disparity among the Courts of Appeals. This Court should now hold that California's survivorship statute does not bar recovery of damages for pain and suffering brought under federal claims.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Supreme Court of the United States grant review of this matter.

Respectfully Submitted,

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-16850
D.C. No. CIV-02-02334-DFL-GGH

[Filed March 26, 2009]

ESTATE OF DOROTHY MARTIN; and MARY MARTIN, *Plaintiff-Appellants,*	)
v.	)
CALIFORNIA DEPARTMENT OF VETERANS AFFAIRS, a California Public Corporation; BRUCE THIESEN, individually and as Secretary of the California Department of Veterans Affairs; GEORGE H. ANDRIES, JR., individually and as Deputy Secretary for Veterans Homes; MARCELLA MCCORMACK, individually and as Administrator of Veterans Home of California, Yountville; JOHN HELTSLY, individually and as Administrator of Veterans Home of California,	)

Barstow; and TOM ARNOLD, individually and as Administrator of Veterans Home of California, Chula Vista,
Defendants-Appellees.

OPINION

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
June 13, 2008—San Francisco, California

Filed March 26, 2009

Before: J. Clifford Wallace, Harry Pregerson,* and Susan P. Graber, Circuit Judges.

Opinion by Judge Graber;
Partial Concurrence and
Partial Dissent by Judge Pregerson

COUNSEL

Chad Carlock, Law Offices of Chad Carlock, Davis, California, for the plaintiffs-appellants.

* Judge Pregerson was drawn to replace Judge Schiavelli. He has read the briefs, reviewed the record, and listened to the recording of oral argument held on June 13, 2008.

John Ruocco, California Department of Veterans Affairs, Sacramento, California, for the defendants-appellees.

OPINION

GRABER, Circuit Judge:

Plaintiffs, the Estate of Dorothy Martin and Mary Martin, Dorothy's daughter, claim that Defendants the California Department of Veterans Affairs ("Department") and its officers and administrators illegally denied Dorothy Martin admission to the Veterans' Home of California ("Home") because of a disability, specifically, Alzheimer's disease and Alzheimer's-related dementia. The district court granted judgment as a matter of law to Defendants on some of Plaintiffs' claims, and a jury returned a verdict in favor of Defendants on the remainder. We hold that the rejection of Dorothy Martin's applications did not violate the Equal Protection Clause, the Rehabilitation Act, or the Americans with Disabilities Act and therefore affirm.[1]

FACTUAL AND PROCEDURAL HISTORY

Plaintiffs' claims arise from Dorothy's unsuccessful applications to reside at the Home.[2] These facilities

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[1] Plaintiffs also challenge the district court's jury instructions and certain of its evidentiary rulings. On those issues, we agree with the district court and affirm its rulings.

[2] The Department operates the Home at three Campuses, one each in Barstow, Chula Vista, and Yountville. Applicants apply to

provide a "home . . . for aged and disabled persons who served in the Armed Forces of the United States of America[,] who were discharged or released from active duty under honorable conditions," and who are California residents at the time of application. Cal. Mil. & Vet. Code § 1012(a).

Admission also depends on additional factors. Department regulations direct the Home to admit eligible applicants, "provided that care for their needs can be furnished within the available resources of the Veterans Home and subject to the levels of care for which direct admission is permitted." Cal. Code Regs. tit. 12, § 501(a). The regulations further provide that the "ability of the Veterans Home to provide adequately and appropriately for the applicant's medical and social needs and the applicant's ability and willingness to adapt to the Veterans Home environment shall be determining factors." *Id.* § 501(d) (emphasis added). The Home "shall refuse admission to applicants with medical conditions or disabilities requiring specialized care, handling, or treatment . . . or other resources not available at the Veterans Home." *Id.* § 501.1 (emphasis added). In addition, admission is provided only on a "first come, first served basis." *Id.* § 502(a).

The Home is licensed by the State of California Department of Health Services to provide five levels of care: (1) independent living or domiciliary; (2) assisted living or residential care; (3) intermediate care;

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each Campus separately.

(4) skilled nursing care; and (5) acute hospital care.[3] *Id.* § 503. Residents move through the levels of care according to their medical needs.

The evidence at trial showed that Dorothy required Skilled Nursing Care,[4] the second-highest level of care available to residents, at the time of her applications. During the period she sought admission, an applicant could not be admitted directly to Skilled Nursing Care unless the occupancy rate at that care level was below 75%. *Id.* § 503(f). In addition, at that time, the Barstow and Chula Vista Campuses did not provide Skilled Nursing Care to new applicants,[5] and the Yountville Campus was admitting residents to the domiciliary level of care only.

Dorothy was diagnosed with Alzheimer's and Alzheimer's-related dementia in 1998. Over an approximately 18-month period beginning in early 2000, Dorothy applied to, and was denied admission by, each Campus of the Home.

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[3] Acute hospital care is the highest level of care available and provides intensive care on a 24-hour basis. Cal. Code Regs. tit. 12, § 503(g). Veterans cannot enter a Home at this level of care, so it is not relevant to the issues on appeal.

[4] Skilled Nursing Care provides residents with 24-hour in-patient care by licensed nursing staff who help with all activities of daily living. *Id.* § 503(f).

[5] The Barstow Campus lacked the required certification to provide Skilled Nursing Care and was prohibited from admitting outside applicants at that level of care. The Chula Vista Campus did not open a Skilled Nursing Care facility until February 2002, after Dorothy died.

Mary Martin cared for her mother until her mother died in November 2001. During that time, Mary used her own money to pay for her mother's care. Mary also suffered "anxiety, frustration, sleeplessness, and despair."

Following Dorothy's death, Plaintiffs brought this action, alleging that Defendants illegally denied Dorothy admission to the Home because of her disability and stating claims under numerous theories of recovery. Over the next three years, those claims were winnowed down to claims against the Department under the Rehabilitation Act, 29 U.S.C. § 794, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, and claims against the Department's officers in their individual capacities under 42 U.S.C. § 1983 for violations of the Equal Protection Clause and California tort law. Plaintiffs sought to recover compensatory, special, and punitive damages.

The case was tried to a jury for a week. Before the jury returned its verdict, the parties filed cross-motions for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). The district court granted Defendants' motion in part, dismissing Plaintiffs' equal protection and state law tort claims against the Department's officers, Mary Martin's claims under the ADA and the Rehabilitation Act against the Department, and the Estate's request for compensatory damages under the ADA and the Rehabilitation Act. The jury returned a verdict in favor of the Department on Plaintiffs' remaining ADA and Rehabilitation Act claims. Plaintiffs again moved for judgment as a matter of law or, in the alternative, a new trial. Defendants moved for costs. The district

court denied Plaintiffs' motion and granted costs to Defendants, but only those associated with the Rehabilitation Act, equal protection, and state law tort claims. Plaintiffs timely appeal.

STANDARDS OF REVIEW

We review de novo both the district court's entry of judgment as a matter of law, *Horphag Research Ltd. v. Pellegrini*, 337 F.3d 1036, 1040 (9th Cir. 2003), and its denial of a renewed motion for judgment as a matter of law, *Josephs v. Pac. Bell*, 443 F.3d 1050, 1062 (9th Cir. 2006). In both instances, we view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Id.*; *Horphag*, 337 F.3d at 1040.

"Judgment as a matter of law is proper when the evidence permits a reasonable jury to reach only one conclusion." *Quiksilver, Inc. v. Kymsta Corp.*, 466 F.3d 749, 755 (9th Cir. 2006) (internal quotation marks omitted). A renewed motion for judgment as a matter of law should be granted if the evidence permits only one conclusion and that conclusion is contrary to the jury's verdict. *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002).

We also review de novo the existence of standing. *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1039 n.3 (9th Cir. 2008).

We review for abuse of discretion the denial of a motion for a new trial. *Pavao*, 307 F.3d at 918. "A trial court may grant a new trial only if the verdict is against the clear weight of the evidence, and may not grant it simply because the court would have arrived

at a different verdict." *Id.* We also review for abuse of discretion a district court's evidentiary rulings and will not reverse in the absence of prejudice. *Josephs*, 443 F.3d at 1064.

When evaluating a challenge to jury instructions, we consider "the charge as a whole to determine whether it is misleading or misstates the law . . . and [we] will not reverse a judgment because of an erroneous instruction if the instructions fairly and adequately cover the issues." *Id.* at 1065 (internal quotation marks omitted). Although the district court has "substantial latitude in tailoring jury instructions," we review the instructions de novo if they are challenged as a misstatement of law. *Mockler v. Multnomah County*, 140 F.3d 808, 812 (9th Cir. 1998). But reversal is not required "if the error was more probably than not harmless." *Id.* (internal quotation marks omitted).

We also review for abuse of discretion an award of costs and will overturn the award "if it is based on an erroneous determination of law." *Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1065 (9th Cir. 2008).

DISCUSSION

A. *The Estate's ADA and Rehabilitation Act Claims*

[1] The Estate first argues that the Department violated the ADA and the Rehabilitation Act. Title II of the ADA and section 504 of the Rehabilitation Act

prohibit discrimination because of a disability.[6] To establish a violation of either statute, the Estate must show that: (1) Dorothy Martin was disabled within the meaning of the statute; (2) she was "otherwise qualified" for the Home's services—i.e., that she could meet the essential eligibility requirements of such services, with or without reasonable accommodation; (3) she was denied the services because of her disability; and (4) the Department received federal financial assistance (for the Rehabilitation Act claim) or was a public entity (for the ADA claim).[7] *Zukle v.*

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[6] Title II of the ADA provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

The Rehabilitation Act provides in pertinent part:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794(a).

[7] Because "[t]here is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act," we have consistently applied "the same analysis to claims brought under both statutes," *Zukle*, 166 F.3d at 1045 n.11, and again do so here.

Regents of Univ. of Cal., 166 F.3d 1041, 1045 (9th Cir. 1999).

[2] The parties agree that Dorothy was "disabled" within the meaning of the ADA and the Rehabilitation Act and that the Department is a public entity that receives federal assistance. The parties disagree, however, on whether Dorothy was "otherwise qualified" for services and whether she was denied those services because of her disability.

[3] Plaintiffs contend that Dorothy was a "qualified" individual because she satisfied the statutory requirements of California Military & Veterans Code section 1012(a). We agree. Dorothy was an honorably discharged veteran and a California resident, so she met those basic eligibility requirements.

[4] In so holding, we reject Defendants' argument that the regulatory requirements appearing in California Code of Regulations sections 501-503 are eligibility requirements. Those regulations prescribe space and resources considerations that must be taken into account when deciding whether an otherwise eligible applicant should be admitted to the Home. For example, section 501(a) provides that the Home "shall admit all eligible applicants, provided that care for their needs can be furnished within the available resources of the Veterans Home and subject to the levels of care for which direct admission is permitted." Cal. Code Regs. tit. 12, § 501(a). By requiring that the Home admit all *eligible* applicants as long as adequate resources are available, the text of section 501(a) implies that the eligibility criteria come from another source, not from section 501(a).

Similarly, section 501(b) states, in part, that the Home "shall provide equal opportunity for admission to all eligible applicants." *Id.* § 501(b). The reference to "eligible applicants" in this regulation confirms that it supplies admission criteria, and not eligibility requirements. The other regulations also speak in terms of admission criteria rather than eligibility requirements. *See, e.g.*, *id.* § 501.1 ("The Veterans Home shall refuse *admission* to applicants with medical conditions or disabilities requiring special care . . . ." (emphasis added)); *id.* § 502(a) ("The Veterans Home shall *admit* veterans on a first come, first served basis . . . ." (emphasis added)).

Moreover, construing the regulations in sections 501-503 as admission criteria, rather than eligibility requirements, better reflects the common understanding of the concept of eligibility. An individual's eligibility for a certain program generally refers to a determination based on that individual's own characteristics. By contrast, the requirements in sections 501-503 restrict admission because of factors that have little to do with an applicant's personal eligibility for services, such as the availability of resources to care for the applicant.

[5] For these reasons, we conclude that Dorothy was "otherwise" qualified for the Home's services. She met the eligibility requirements of section 1012(a) and did not have to meet the requirements of sections 501-503. Because Dorothy was "otherwise" qualified, we need not address whether reasonable accommodation was possible.

We next turn to the causation element of Plaintiffs' claims. Although Dorothy was otherwise qualified for

Home services, the Estate failed to establish violations of the ADA and the Rehabilitation Act because it could not prove that Dorothy was denied those services "by reason of" (for the ADA claim) or "solely because of" (for the Rehabilitation Act claim) her disability.

[6] With respect to the ADA claim, we have held that the phrase "by reason of" in the statute establishes a "motivating factor" causal standard for liability when there are two or more possible reasons for the challenged decision and at least one of them may be legitimate. *Head v. Glacier Nw., Inc.*, 413 F.3d 1053, 1066 (9th Cir. 2005). That is, if the evidence could support a finding that there is more than one reason for an allegedly discriminatory decision, a plaintiff need show only that discrimination on the basis of disability was a "motivating factor" for the decision. *Id.* Here, however, Dorothy never argued that there was more than one reason for denying her admission to the Home. She consistently argued that the *only* reason was her disability.[8]

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[8] The district court discussed this issue in its order holding that Plaintiffs were not entitled to a "motivating factor" instruction. *See Head*, 413 F.3d at 1065-66 (noting that a "motivating factor" instruction is not necessary if the evidence in a particular case does not suggest "more than one possible reason" for the challenged action). The court noted that *Plaintiffs'* proposed jury instructions directed the jury to consider whether Dorothy's disability was "*the*" determining factor for the denial or admissions, not "*a*" determining factor. Plaintiffs' proposed jury instructions also stated that "plaintiff[s] claim[ ] that Dorothy Martin's disability was the *sole* reason for the defendant[s'] decision not to provide benefits and services to Dorothy Martin." (Emphasis added.) The district court further noted that discrimination on the basis of disability *alone* was Plaintiffs'

[7] Because Dorothy eschewed a mixed-motive theory, it is questionable whether the "motivating factor" test should apply. But, even if it should, Dorothy failed to show that her disability was a motivating factor for denying her admission to the Home. The evidence at trial demonstrated that Dorothy was denied admission because of the Home's lack of resources and space to provide the level of care that she required. Dorothy required help with at least five activities of daily living, which meant that she qualified only for Skilled Nursing Care. No beds were available in the Yountville Campus Skilled Nursing Care facility when Dorothy applied, and neither the Chula Vista Campus nor the Barstow Campus had licensed Skilled Nursing Care facilities into which she could have been admitted. In other words, Dorothy was denied admission because none of the facilities had adequate resources to be able to care for her properly, not because of her disability. The verdict form reflects that the jury unanimously found that Dorothy failed to prove "that the defendant California Department of Veterans Affairs discriminated against Dorothy Martin *by reason of her disability*" (emphasis added), and the evidence at trial supports that finding.

The causal standard for the Rehabilitation Act is even stricter, demanding that Dorothy show that she was denied services "solely by reason of" her disability. 29 U.S.C. § 794(a). As we have explained above, Dorothy failed to show that she was denied admission solely by reason of her disability.

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theory of the case "from the beginning of the litigation," so no mixed motive instruction was necessary.

[8] In sum, we hold that, on this record, the jury reasonably found that the Department did not discriminate against Dorothy Martin on the basis of her disability. The policies that Plaintiffs attack, rather than discriminating on the basis of disability, simply reflect the unfortunate fact that a facility with limited resources cannot serve every disabled individual who needs care. The Department must decide whom to admit and whom to turn away. Here, it has made decisions on the permissible basis of the availability of adequate resources to care for an individual applicant, not on the impermissible basis of disability discrimination.

B. *Mary Martin's ADA and Rehabilitation Act Claims*

Mary Martin appeals the district court's grant of judgment as a matter of law to the Department on her ADA and Rehabilitation Act claims, which allege financial and emotional loss as a result of the Department's alleged discrimination against her mother. The district court held that Mary's ADA and Rehabilitation Act claims were procedurally improper because the Department did not cause her direct injury.

[9] We need not reach the question whether Mary can bring third-party claims under the ADA and the Rehabilitation Act because her derivative claims are premised entirely on the existence of illegal discrimination against Dorothy. Because the Department did not discriminate against Dorothy, no derivative claim could succeed on the merits, even if it were procedurally proper. *See United States v. Washington*, 969 F.2d 752, 755 (9th Cir. 1992) ("We may affirm on any basis supported by the record even

if the district court did not rely on that basis." (internal quotation marks omitted)).

C. *The Estate's § 1983 Claim*

[10] In a claim brought under 42 U.S.C. § 1983, the Estate alleges that the Department's officers violated the Equal Protection Clause by treating Dorothy and similarly situated applicants—those with Alzheimer's-related dementia who are not self-sufficient—differently than other applicants. "[A] governmental policy that purposefully treats the disabled differently from the non-disabled need only be 'rationally related to legitimate legislative goals' to pass constitutional muster." *Lee v. City of Los Angeles*, 250 F.3d 668, 687 (9th Cir. 2001) (quoting *Does 1-5 v. Chandler*, 83 F.3d 1150, 1155 (9th Cir. 1996)); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-43 (1985) (declining to apply heightened scrutiny to a classification based on mental retardation). Applying that standard, we have no difficulty concluding that the Department's admission policies pass constitutional muster.

[11] The government "must have substantial latitude to establish classifications that . . . account for limitations on the practical ability . . . to remedy every ill." *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *see also Lipscomb v. Simmons*, 962 F.2d 1374, 1380-81 (9th Cir. 1992) (en banc) (upholding the allocation of "finite resources available to the state" in foster home funding because it was rationally related to the government's interest in "maximiz[ing] the amount of money available" for the program). The Home does not reject applicants because of dementia; rather, the Home accepts applicants with dementia *if* there are resources

available at the level of care required for them *and* sufficient resources remain to meet the anticipated care requirements of all current residents. The Department's officers' method of classifying applicants on the basis of their initial level of self-sufficiency is rationally related to the goal of providing life-long care to as large a group as possible, given limited resources and a huge population of potentially eligible California veterans.[9] Consequently, we affirm the district court's grant of judgment to Defendants as a matter of law on this claim.

D. *Mary Martin's § 1983 Claim*

[12] Mary Martin advances a § 1983 claim for the violation of Dorothy Martin's equal protection rights. As a general rule, a third party does not having standing to bring a claim asserting a violation of someone else's rights. *See Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties."). We recognize an exception to this general rule if, among other things, "there . . . exist[s] some hindrance to the third party's ability to

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[9] In 2007, California was home to nearly 2.2 million veterans. *See* Geographic Distribution of VA Expenditures for FY 2007, California, http://www1.va.gov/vetdata/docs/GDX_FY07.xls (last visited Nov. 5, 2008) (estimating the total veteran population as of Sept. 30, 2007). To serve that population, the Home has space available for only 2,000 residents in its three Campuses. *See* Information for Applying to the Veterans Home of California, http://www.cdva.ca.gov/Homes/DocsAndImages/vhcinfo.pdf (last visited Mar. 18, 2009) (describing the approximate number of beds available at each Campus).

protect his or her own interests." *Voigt v. Savell*, 70 F.3d 1552, 1564 (9th Cir. 1995) (internal quotation marks omitted). Here, the Estate, which is the other Plaintiff in this action, has pursued a procedurally proper (albeit substantively unsuccessful) equal protection claim directly on behalf of Dorothy Martin. We therefore hold that Mary Martin does not have standing to bring a claim under § 1983 alleging that Defendants violated her mother's right to equal protection under the laws.

E. *The Estate's State Law Tort Claims for Emotional Distress*

[13] The Estate alleges tort claims of intentional infliction of emotional distress and negligent infliction of emotional distress under California law. The district court held that, under California law, the Estate's tort claims for emotional distress did not survive the death of Dorothy Martin. We agree.

Under California law,

> [i]n an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that decedent would have been entitled to recover had the decedent lived, and *do not include damages for pain, suffering, or disfigurement*.

Cal. Civ. Proc. Code § 377.34 (emphasis added). Notwithstanding the emphasized text, which clearly

precludes recovery of emotional distress damages, the Estate reasons that the tort claims survive because Dorothy could have recovered punitive damages.

The California Court of Appeal recently considered and rejected this precise argument. *Berkley v. Dowds*, 61 Cal. Rptr. 3d 304, 316 (Ct. App. 2007). Section 377.34 does not permit recovery for emotional distress upon the death of the person allegedly harmed and, under long-established California authority, "an award of compensatory damages in some amount is a prerequisite to a punitive damage award." *Berkley*, 61 Cal. Rptr. 3d at 316. We see no reason to disagree with the analysis of the California Court of Appeal. *See Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir. 2001) (stating that, if the state's highest court has not decided the issue and "there is no convincing evidence that the state supreme court would decide differently, a federal court is obligated to follow the decisions of the state's intermediate appellate courts" (internal quotation marks omitted)). Accordingly, we affirm the district court's grant of judgment as a matter of law to Defendants on the Estate's state law tort claims for emotional distress.

F. *Mary Martin's State Law Tort Claims for Emotional Distress*

[14] Mary Martin alleges a claim of intentional infliction of emotional distress under California Law and argues that the alleged violations of the ADA, Rehabilitation Act, and § 1983 support her claim that Defendants' conduct was outrageous. In order to establish a claim of intentional infliction of emotional distress, Mary must prove, among other things, "extreme and outrageous conduct by the defendant

with the intention of causing, or reckless disregard of the probability of causing, emotional distress." *Christensen v. Superior Court*, 820 P.2d 181, 202 (Cal. 1991) (internal quotation marks omitted). As discussed above, Plaintiffs' claims of discrimination under the ADA, the Rehabilitation Act, and § 1983 fail. Consequently, this state law claim fails as well.

Mary also alleges a "bystander" claim of negligent infliction of emotional distress under California law. In order to establish that claim, Mary must prove, among other things, that she "[wa]s present at the scene of the injury producing event at the time it occur[red] and [wa]s then aware that it [wa]s causing injury to the victim." *Thing v. La Chusa*, 771 P.2d 814, 829-30 (Cal. 1989). Because we have held that Dorothy suffered no legally cognizable injury, Mary cannot recover on a bystander theory. Accordingly, we affirm the district court on Mary Martin's state law tort claims of emotional distress.

G. *Costs to Defendants*

Finally, Plaintiffs challenge the district court's award of costs to Defendants. We are not persuaded by their arguments.

[15] The district court ruled that Defendants were not entitled to costs under the ADA because such costs are appropriate only if the claim is frivolous, unreasonable, or without foundation. *See Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1190 (9th Cir. 2001) (holding that the standard announced in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)—permitting the recovery of *attorney fees* by a prevailing defendant under Title VII only when the

claim "was frivolous, unreasonable, or without foundation"—also applies to the award of costs under the ADA). The court held that Plaintiffs' ADA claims did not meet that standard.

The district court awarded costs under the Rehabilitation Act, however. Although there was no direct authority to guide it, the district court observed that the costs provision of the Rehabilitation Act is more similar to the costs provision in Title VII than to the costs provision in the ADA. For that reason, the district court concluded that costs under the Rehabilitation Act are governed by *National Organization for Women v. Bank of Cal., N.A.*, 680 F.2d 1291, 1294 (9th Cir. 1982) (per curiam), which held that costs under Title VII follow the general rule that costs are awarded "as a matter of course absent express statutory provision, 'unless the court otherwise directs.' " *Id.* at 1294 (quoting Fed. R. Civ. P. 54(d)). The district court also ruled that Defendants were entitled to costs on Plaintiffs' state law tort claims. The court apportioned costs and, because the ADA claim was the central claim in Plaintiffs' action, awarded only 50% of Defendants' request.

Plaintiffs argue that the same standard—the *Christiansburg* standard—that governs costs under the ADA should govern costs under the Rehabilitation Act. To our knowledge, none of our sister circuits has applied the *Christiansburg* standard to costs under the Rehabilitation Act, and we decline to do so here.

[16] In *Brown*, we examined the text of the ADA to determine whether our ruling in *Summers v. A. Teichert & Son, Inc.*, 127 F.3d 1150, 1154 (9th Cir. 1997), in which we acknowledged that the

Christiansburg standard applies to a request for *attorney fees* under the ADA, also applied to a request for *costs* under the ADA. *Brown*, 246 F.3d at 1190. We looked at the text of the costs provision of the ADA: "[T]he court . . . , in its discretion, *may* allow the prevailing party . . . a reasonable attorney's fee, *including* litigation expenses, and costs . . . ." 42 U.S.C. § 12205 (emphases added). We observed that the ADA makes fees and costs parallel and held that, as a result, the *Christiansburg* standard does apply to costs under the ADA. *Brown*, 246 F.3d at 1190.

That parallel structure in the ADA between costs and attorney fees is critically absent from the relevant texts of both the Rehabilitation Act and Title VII. *Compare* 29 U.S.C. § 794a(b) [Rehabilitation Act] (permitting the prevailing party to recover "a reasonable attorney's fee *as part of the costs*" (emphasis added)), *and* 42 U.S.C. § 2000e-5(k) [Title VII] (allowing "a reasonable attorney's fee . . . *as part of the costs*" (emphasis added)), *with* 42 U.S.C. § 12205 [ADA] (permitting the court to award "a reasonable attorney's fee, *including* litigation expenses, and *costs*" (emphases added)). Thus, our rationale in *Brown* for applying *Christiansburg* to the award of costs under the ADA does not carry over to costs under the Rehabilitation Act.

[17] Considering the similarity between the costs provisions in Title VII and the Rehabilitation Act, it is appropriate to use our Title VII precedent, as the district court did, to establish a standard for the award of costs under the substantively identical text in the Rehabilitation Act. As is the case with Title VII, "[t]here is no express statutory provision for applying *Christiansburg* to cost awards [under the

Rehabilitation Act], and we see no reason to impose rigid limitations on the district court's discretion." *Nat'l Org. for Women*, 680 F.2d at 1294.

Moreover, the text of the Rehabilitation Act supports an inference that costs are to be awarded in the ordinary course. Section 794a(b) of the Rehabilitation Act provides that, "[i]n any action or proceeding to enforce or charge a violation of [the Rehabilitation Act], the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." That text makes an attorney fee award discretionary; if given, it may be made a part of the costs. The text does not suggest that "*the* costs" are similarly discretionary, but rather that they are a given, to which fees *may* attach. Accordingly, the wording of the statute supports an inference that the general provision in Rule 54(d)(1) of the Federal Rules of Civil Procedure—that costs are allowed in the ordinary course to the prevailing party—applies. Rule 54(d)(1) "creates a presumption in favor of awarding costs to a prevailing party." *Ass'n of Mexican-Am. Educators v. California*, 231 F.3d 572, 591 (9th Cir. 2000) (en banc).

[18] For these reasons, we hold that an award of costs under the Rehabilitation Act need not satisfy the *Christiansburg* test and that the district court did not abuse its discretion in awarding costs to Defendants as the prevailing party on the Rehabilitation Act claim.

With respect to the calculation of costs, the district court justified its award by explaining that, although Defendants could not recover costs on Plaintiffs' central claim—the ADA claim—the remaining three primary claims accounted for about half the case.

Thus, the court awarded 50% of Defendants' total request. Having presided over the case from its inception, the court knew the relative proportion of the total litigation that each of the primary claims represented. The court's explanation, although not extensive, was sufficient and was reasonable. Therefore, we affirm the award of costs.

AFFIRMED.

PREGERSON, Circuit Judge, concurring in part and dissenting in part:

I dissent in part and concur in part in the court's opinion. I disagree with the majority's opinion on two points: (1) that "an award of costs under the Rehabilitation Act need not satisfy the *Christiansburg* test" and (2) "that the district court did not abuse its discretion in awarding costs to Defendants as the prevailing party on the Rehabilitation Act claim." Maj. Op. at 3621. In all other respects, I agree and concur.

In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978), the Supreme Court held that, under Title VII, a prevailing defendant may only recover attorney's fees when the plaintiff's claim is "frivolous, unreasonable, or without foundation." In particular, the Supreme Court noted that "assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote vigorous enforcement of the provisions of Title VII." *Id.* at 422.

We have applied the *Christiansburg* standard to both attorney's fees *and costs* under the American with Disabilities Act ("ADA"). *See Summers v. A. Teichert & Son, Inc.*, 127 F.3d 1150, 1154 (9th Cir. 1997) (applying the *Christiansburg* standard to an award of attorney's fees under the ADA); *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1190 (9th Cir. 2001) (applying the *Christiansburg* standard to an award of costs under the ADA). But here the majority's opinion concludes that the *Christiansburg* standard does not apply to an award of costs to a prevailing defendant under the Rehabilitation Act. Maj. Op. at 3619-21.

The majority's opinion states that "the wording of the statute supports an inference . . . that costs are allowed in the ordinary course to the prevailing party." Maj. Op. at 3621. I believe that the plain text of the Rehabilitation Act's cost provision is ambiguous. The Rehabilitation Act's cost provision states that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 29 U.S.C. § 794a(b). The Rehabilitation Act, however, does not clearly state whether costs are discretionary or presumed, nor does the Rehabilitation Act state which standard should be applied to an award of costs.

"If the statute's terms are ambiguous, we may use canons of construction, legislative history, and the statute's overall purpose to illuminate Congress's intent." *Jonah R. v. Carmona*, 446 F.3d 1000, 1007 (9th Cir.2006) (citing *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1045 (9th Cir. 2005). While the majority's opinion prefers to resolve any ambiguity by analogizing the text of the Rehabilitation Act to the text of Title VII, I believe that it is more appropriate that we look to the Rehabilitation Act's overall

purpose, and that we ensure that the cost provisions of the Rehabilitation Act and the ADA are interpreted consistently because they deal with the same subject: disability rights. *See United States v. Nader*, 542 F.3d 713, 717 (9th Cir. 2008) (quoting *Jonah R.*, 446 F.3d at 1007) (stating that "we may consider related statutes because 'statutes dealing with similar subjects should be interpreted harmoniously' ").

Both the Rehabilitation Act and the ADA were enacted for the specific purpose of protecting the rights of individuals living with disabilities. *Compare* 29 U.S.C. § 701(b)(2) (stating that the purpose of the Rehabilitation Act is "to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with significant disabilities") *with* 42 U.S.C. § 12101 (stating that the purpose of the ADA is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities" and "to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities"). Indeed, as was the case here, many plaintiffs living with disabilities present claims under both the ADA and Rehabilitation Act when bringing a federal action to protect their rights. Accordingly, the standard for awarding costs to a prevailing defendant under the ADA and the Rehabilitation Act should be consistent.

Therefore, the better rule would be to apply the *Christiansburg* standard to an award of costs to a prevailing defendant under both the Rehabilitation Act and the ADA. If a plaintiff pursues an unsuccessful Rehabilitation Act claim, he should not be forced to

bear the costs associated with litigation unless his claim was frivolous, unreasonable, or without foundation. Subjecting a plaintiff to an award of costs on reasonable Rehabilitation Act claims will likely deter individuals with disabilities from bringing suit and thus limit effective enforcement of the statute.

Accordingly, I dissent in part and concur in part.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV-S-02-2334 DFL-GGH

[Filed August 31, 2006]

Estate of DOROTHY MARTIN; MARY MARTIN,	)
Plaintiffs,	)
v.	)
CALIFORNIA DEPARTMENT OF VETERANS AFFAIRS, et al.,	)
Defendants.	)

MEMORANDUM OF OPINION AND ORDER

Plaintiff Mary Martin, individually and on behalf of the estate of her mother Dorothy Martin (collectively "Martin"), brought this suit against the California Department of Veterans Affairs and various of its officers (collectively "the Department") alleging violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, and the Rehabilitation Act, 29 U.S.C. § 794. Plaintiffs claim that the Department improperly denied Dorothy Martin

admission to the Veterans Home of California ("VHC") because she suffered from Alzheimer's disease. Martin also asserted a claim under the equal protection clause and state law claims for negligent and intentional infliction of emotional distress.[1]

The case was tried to a jury beginning on October 11, 2005. On October 18, 2005, both parties filed motions for judgment as a matter of law. The court granted the Department's motion in part, dismissing: (1) the equal protection and state law tort claims; (2) Mary Martin's claims under the ADA and the Rehabilitation Act because she lacked standing; and (3) the compensatory damages claims for violations of the ADA and the Rehabilitation Act because Martin did not provide evidence of intentional discrimination. On October 20, 2005, the jury returned a verdict for the Department finding that Martin did not prove by a preponderance of the evidence that the Department discriminated based on disability. On October 28, 2005, the Department submitted a bill of costs. On November 4, 2005, Martin filed a renewed motion for judgment as a matter of law and a motion for new

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[1] The court's July 22, 2003 order explains that neither the Department nor its officers are shielded from suit in federal court under the Eleventh Amendment as to the ADA and Rehabilitation Act claims. See Lovell v. Chandler, 303 F.3d 1039, 1050 (9th Cir. 2002). However, the court found that plaintiffs could not bring ADA or Rehabilitation Act claims against the Department officers in their individual capacities because both statutes are directed at the actions of public entities only. See Miranda B. v. Kitzhaber, 328 F.3d 1181, 1188(9th Cir. 2003). Finally, the supplemental state law tort claims were dismissed as to the Department and the defendants in their official capacities because of the Eleventh Amendment bar. These claims were permitted to go forward against the individual defendants in their individual capacities.

trial. Martin's motions and the Department's bill of costs are the subject of this order.

I. Judgment as a Matter of Law

Martin raises ten arguments in support of her renewed motion for judgment as a matter of law. Each argument is addressed under a separate heading below.

A. Facial Discrimination

Martin asserts that when compared to similarly-situated non-disabled applicants to the VHCs, applicants with Alzheimer's or dementia[2] are denied admission because of their disability.[3] Martin

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[2] There has been some inconsistency in Martin's theory of discrimination. In its ruling on the summary judgment motions, the court permitted the case to go forward on the view that Martin was alleging discrimination against persons with a particular disease, Alzheimer's, regardless of its severity, as compared to other eligible veterans with different disabilities. It appears that Martin may have abandoned this theory given that the evidence shows that during the time of her application the VHCs did not expel veterans already resident in the home who developed Alzheimer's. There was some evidence that the Chula Vista home may have had a policy of excluding applicants with Alzheimer's disease, even if the applicant was otherwise able to function in the residential domiciliary facility ("DOM"). However, although the parties disputed the degree of Dorothy Martin's disability, the weight of the evidence favored a jury finding that at no relevant time was she qualified for the DOM.

[3] In the reply brief, Martin argues that "all that is required under the ADA is that the disability be a 'motivating factor' in the decision to exclude the plaintiff, rather than the 'sole' factor. (Id. (citing Head v. Glacier Northwest Inc., 413 F.3d 1053, 1065 (9th

asserts that "[d]efendants' policies are unnecessary, facially discriminatory, and therefore invalid and illegal under the [ADA], the Rehabilitation Act, and the equal protection clause of the 14th Amendment." (Mot. at 3-4.)[4] The focus of this attack is on the four different care levels and facilities and, more particularly, the VHC policy of reserving 25% of the vacant beds in the higher care levels for existing residents of the DOM. The stated reason for the policy is to assure residents of the DOM that they will not face expulsion if they become infirm and require a space in one of the higher care levels. The unfortunate result of this otherwise understandable policy is that an eligible veteran like Dorothy Martin, not already a

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Cir. 2005)).)

This argument is irrelevant for two reasons. First, "[a] post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion." Fed. R. Civ. P. 50(b), Advisory Committee Notes on the 1991 Amendments; see also Murphy v. City of Long Beach, 914 F.2d 183, 186 (9th Cir. 1990). Because Martin failed fairly to raise this argument previously, the court cannot address it now. Second, even if the "motivating factor" standard applied, the jury still could have reasonably concluded that Dorothy Martin's disability did not "motivate" the Department's decision to exclude her, as discussed below.

[4] Martin also asserts that the policies violate state law because they "impermissibly alter and restrict the scope of the [VHC] eligibility statute (Cal. Mil. & Vets. Code § 1012)." According to Martin, § 1012 requires the VHC to admit any qualified veteran whether or not there is space in the VHC for that veteran. There are a number of problems with this line of argument: (1) § 1012 does not say this, (2) it is not reasonable to interpret the statute in the manner suggested given that the statute itself envisions that not enough space will be available for all eligible veterans, see Cal. Mil. & Vets. Code § 1012(b)(1), and (3) plaintiffs did not make a claim under § 1012.

member of a Home, may be denied admission to the higher care levels even though a bed is open.

Several layers of rules and regulations govern the VHC's admission policies. First, California Military & Veterans Code § 1012 enumerates the eligibility requirements for admittance to one of the VHC homes. According to § 1012, eligible individuals are those who: (1) served in the U.S. armed forces; (2) were honorably discharged from service; (3) are eligible for hospitalization or domiciliary care in a veterans' facility in accordance with the rules and regulations of the U.S. Department of Veterans Affairs; and (4) are bona fide residents of California at the time of application. Cal. Mil. & Vet. Code § 1012(a). Dorothy Martin is eligible for admission to a VHC home under these criteria.

Second, each VHC home has its own admission policies and rules. The rules of all three VHC homes to which Dorothy applied refer to Alzheimer's as a possibly disqualifying condition for admittance depending on the severity of the condition.[5] For instance, Barstow's admissions policies state that an applicant whose medical needs "exceed the reasonable resources of the Home shall be rejected or referred to the Chief Medical Officer for further review such as . . . (3) diagnosis of Alzheimer's related Dementia." (Pls.' Ex. 50.) Similarly, Yountville's policies state that "[a]n applicant whose medical needs exceed the reasonable resources of the Home shall be denied, such as . . . (4) diagnosis of Alzheimer's or dementia whose needs

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[5] California Military and Veterans Code § 1044 gives the VHCs the authority to adopt their own policies.

exceed current resources." (Id. Ex. 52.) Finally, Chula Vista's current policies explicitly exclude Alzheimer's patients, listing Alzheimer's disease as a disqualifying condition for admission. (Id. Ex. 51.) However, this policy was not created until December 2001, one month after Dorothy Martin's death. (Id.)

In addition to the admissions restrictions, the VHC homes are limited by statute and regulation as to what levels of care they can provide. All three VHC homes, collectively, offer admissions to four levels of care: Domiciliary ("DOM"), Residential Care for the Elderly ("RCFE"), Intermediate Care ("ICF"), and Skilled Nursing ("SNF"). (Defs.' Trial Br. at 1-2.)

The DOM provides the lowest level of care and does not provide nursing services. (Defs.' Ex. 20 at 1.) Residents must be entirely independent and able to perform all of the activities of daily living ("ADLs"). (Id.) The DOM is a group home that provides a social community and activities for independent elderly veterans in a dormitory setting. The RCFE is the next level of care and provides medication assistance and stand-by assistance for bathing. (Id. at 2.) The ICF provides more assistance than the RCFE, but only admits residents who need assistance with no more than two ADLs. (Id.) Finally, the SNF provides 24-hour in-patient care, including medical, nursing, dietary, and pharmaceutical services. (Id.) Not all four levels of care are offered at all three VHC homes at all times. (Id. at 2-3.) To be eligible for state and federal funding, each VHC home must obtain a separate license issued by the California Department of Health Services for each level of care at that VHC home. (Id. at 4, 7, 8.) CDVA regulations define what services can be provided in each level of care. Cal. Code Regs. tit.

12, § 503. Additionally, during the relevant time period, CDVA regulations required that "[n]o direct admission to the [SNF level of care] is allowed from outside sources except when the [SNF] occupancy rate is below 75%." Id. § 501.2.

These policies are not facially discriminatory as a matter of law. First, the ADA does not force a health care provider "to provide extraordinary services which it is not set up to deliver." Alexander v. Pathfinder, Inc., 906 F. Supp. 502, 507 (E.D. Ark. 1995), judgment aff'd in part, rev'd in part, 91 F.3d 59 (8th Cir. 1996) (finding that discharging a disabled individual from a residential intermediate care facility is not discriminatory if the individual required considerably more medical care than the facility could provide). As the Alexander court noted,

> [t]he ADA was never intended to prevent a facility, whose 'customers' are all disabled, from limiting the scope of the services it provides to the disabled. Surely all facilities cannot be required to serve disabled individuals with every degree of disability. If that were the case, it would require abandonment of designations such as "intermediate care" and "total care." As noted, federal regulations are replete with such distinctions; it cannot have been the intent of Congress to prohibit the specialization of facilities which care for the disabled.

Id. at 508. Therefore, the CDVA's policy to limit the services it provides and to create specialized units of care based on severity of disability is not facially discriminatory under the ADA. Otherwise, most, if not all healthcare facilities would be facially

discriminatory — a physical rehabilitation center for not offering chemotherapy, a retina institute for not offering hearing aids, a residential nursing facility for not offering an intensive care unit. Furthermore, the jury could also find from the record that the policy of all the various homes was not to exclude an eligible veteran with a diagnosis of Alzheimer's but only to exclude a veteran with such a diagnosis if her condition was such that the Home could not properly treat it or if the condition required placement in a care level that was unavailable.

The Department's 75% rule is also not discriminatory as a matter of law. As plaintiffs acknowledge, the VHCs serve to provide long-term care for aged and disabled veterans. (Mot. at 6.) Thus, the VHCs have a long-term obligation to their members and may ensure that those members have access to sufficient care throughout their lives. It was up to the jury to decide whether the 75% rule was a reasonable way to protect existing residents from eviction or was instead a cover for discrimination. Defendants introduced evidence that if the VHCs were forced to accept every new Alzheimer's applicant the Homes would run out of room for existing residents that later develop the disease.[6] Therefore, a jury could

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[6] If one were to follow plaintiffs' argument to its logical conclusion, these discharged residents could also claim that they were excluded "on the basis of disability" in violation of the ADA. To prevent such claims, the Department would be forced to provide care to all Alzheimer's patients who either resided in the homes or applied for admission to the homes, or shut the homes entirely. Given the extraordinary growth of Alzheimer's in the veteran and general population, it is likely that the VHCs would be forced to close. The ADA does not require such a counter-productive result.

conclude that the Department's decision to save room for existing residents rather than to admit new residents was not discriminatory under the ADA.[7]

For these reasons, the court denies plaintiffs' motion for judgment as a matter of law on the grounds that the Department's regulations are facially discriminatory under the ADA or the Rehabilitation Act.

B. "Qualified Individual with a Disability"

Plaintiffs assert that "[t]he evidence presented at trial conclusively established that Dorothy Martin was a 'qualified individual with a disability' under the ADA and the Rehabilitation Act." (Mot. at 8.)

A. Qualified Individual

A person is "qualified" if she satisfies all of a program's requirements other than those that are unreasonable and discriminatory. Jacobson v. Delta Airlines, Inc., 742 F.2d 1202, 1205 (9th Cir. 1984). As discussed above, a reasonable jury could determine that the Department's requirements were not unreasonable or discriminatory. Therefore, the jury had the responsibility to evaluate whether Dorothy Martin was "qualified" at the time she applied based on these requirements. Dorothy Martin also would have qualified for a certain level if the Department could have made reasonable accommodations to enable her to qualify for that level at the time she applied. 28 C.F.R. § 35.130(b)(7).

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[7] The analysis under the Rehabilitation Act is the same.

At trial, defendant introduced Dorothy Martin's medical records and her VHC application to demonstrate that she required assistance with at least 5 ADLs, including bathing, grooming, dressing, medication, and toileting. (Def.'s Exs. 1-13, 17.) From this evidence, the jury could conclude that Dorothy Martin was only qualified for the SNF facility.

Defendants also presented evidence to show that, at the time she applied for admission, none of the facilities had SNF beds available. The Chula Vista facility was under construction and the SNF was not yet completed. (Def.'s Ex. 36.) Barstow had lost its certification for its SNF and could not legally receive government funds for new admissions. (Def.'s Trial Br. at 2.) Finally, defendants presented evidence that Yountville was not accepting outside applicants because the occupancy rate of the SNF was 81.5% when Dorothy Martin applied in November 2000 and there were already 45 people on the waiting list for the SNF. (Pls.' Ex. 37.) By October 24, 2001, when Mary Martin renewed her inquiry, the situation had worsened; by then the occupancy rate was at 75.6% and there were 99 people on the waiting list. (Def.'s Ex. 37.)

Plaintiffs produced calculations at trial to show that the actual occupancy rate of the SNF never came close to 75% from 1994 through 2003, given the number of residents at each level of care and the licensed capacity of the SNF. (Reply at 8.) However, defense witness Marcella McCormack testified that plaintiffs' calculations were incorrect because the licensed beds were unfunded and could not be used. (Surreply at 5.) Moreover, even if the beds could have been used, Yountville would likely have admitted the

dozens of people already on the waiting list before it would have admitted Dorothy Martin.

Given this evidence, a reasonable jury could conclude that none of the VHCs had room for Dorothy Martin at the time she applied, and that she was otherwise unqualified for admission.

B. Reasonable Accommodations

Dorothy Martin is also a "qualified individual" if the Department could have made reasonable modifications to enable her to qualify. 28 C.F.R. § 35.130(b)(7). The initial burden is on plaintiffs to establish the existence of reasonable modifications. Zukle v. Regents of Univ. of Cal., 166 F.3d 1041, 1047 (9th Cir. 1999). This burden is "not a heavy one." Henrietta D. v. Bloomberg, 331 F.3d 261, 280 (2d Cir. 2003). "[I]t is enough for . . . plaintiff[s] to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits." Id. Once the plaintiff has done this, "[t]he burden shifts to the [Department] to produce evidence that the . . . accommodation would require a fundamental or substantial modification of its programs or standards." Zukle, 166 F.3d at 1047.[8]

In analyzing whether an accommodation would be a "fundamental alteration," the financial and other

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[8] Although Zukle and Henrietta deal with reasonable accommodations under Title III rather than Title II, the burden is the same under both titles. See McGary v. City of Portland, 386 F.3d 1259, 1266 (9th Cir. 2004) ("Although Title II of the ADA uses the term 'reasonable modification,' rather than 'reasonable accommodation,' these terms create identical standards.")

logistical limitations on a state's capacity to provide such services must be considered, Townsend v. Quasim, 328 F.3d 511, 519-20 (9th Cir. 2003), as well as whether the modification would alter the essential nature of the program or impose an undue burden or hardship in light of the overall program. Easley v. Snider, 36 F.3d 297, 305 (3d Cir. 1994). The analysis looks not simply at the cost of accommodating the specific plaintiff but rather to whether "immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." Olmstead v. L.C., 527 U.S. 581, 604, 119 S.Ct. 2176 (1999). The jury was so instructed.

Plaintiffs suggested at trial that the Department could have: (1) used all licensed beds or created more; (2) provided dementia care in the lower levels; (3) admitted to the SNF without certification; (4) ignored or eliminated the 75% rule; (5) admitted to a "crowded" SNF on a conditional basis; (6) paid for the care of all eligible veterans at private facilities; or (7) built fences, installed alarms or re-hung gates to make the RCFE suitable for Alzheimer's and dementia patients. (See Mot. at 12.)

The Department introduced evidence that these suggested accommodations would create an undue hardship because the costs of implementing them would financially cripple the Department and prevent it from maximizing the number of veterans it could assist. A reasonable jury could conclude from the testimony that: (1) the VHCs could not reasonably use all licensed beds or create more beds because they could not afford the nurses to care for the people who

would occupy them; (2) the VHCs could not have provided dementia care in the lower levels because doing so would effectively turn those units into SNF units, which require separate licenses and increased staffing; (3) the VHCs could not admit to the SNF without certification, because to do so would violate the law; (4) ignoring or eliminating the 75% rule would leave current members without beds once their needs increased, as would admitting to a "crowded" SNF on a conditional basis; (5) the cost of paying for every disabled veteran's private care would be prohibitive; and (6) building restrictive structures like fences would psychologically harm veterans who experienced the shock of battle and may have been prisoners of war. In sum, from this evidence the jury could conclude that the Department was not able to make any reasonable accommodations to admit Dorothy Martin. Judgment as a matter of law for plaintiffs is not possible.

C. Exclusion Because of Disability

Plaintiffs next argue that they are entitled to judgment as a matter of law because "[t]he evidence presented at trial conclusively established that Dorothy Martin was excluded from receiving the benefits of the VHC because of her disability." (Mot. at 9.) However, as discussed in subsection A above, a reasonable jury could conclude that she was not excluded because of her disability but because of policies that were not discriminatory.

D. "Fundamental Alteration" Defense

Plaintiffs assert that the "fundamental alteration" defense does not apply in cases of facial discrimination.

(Mot. at 6 (citing Bay Area Addiction Research & Treatment, Inc. v. City of Antioch ("BAART"), 179 F.3d 725, 734-35 (9th Cir. 1999); Lovell v. Chandler, 303 F.3d 1039, 1054 (9th Cir. 2002).) Even if this were a case of facial discrimination, plaintiffs cannot raise this argument now because they did not raise it in their pre-verdict motion for judgment as a matter of law. Fed. R. Civ. P. 50(b), Advisory Committee Notes on the 1991 Amendments; see also Murphy v. City of Long Beach, 914 F.2d 183, 186 (9th Cir. 1990). In their original motion, plaintiffs merely stated that "[t]he evidence presented at trial also conclusively proved that Defendants' anticipated defenses of undue burden or fundamental alteration are not applicable." (Pre-verdict Mot. at 5.) Plaintiffs did not argue that they were inapplicable because the Department's policies were facially discriminatory. Moreover, plaintiffs included the defense in their proposed jury instructions ## 30 and 31. Although the court does not have a transcript of the jury instruction proceedings, it has no recollection of any objection by plaintiffs to the court's inclusion of the defense in the final jury instructions. The Ninth Circuit has assumed that the defense applies when plaintiffs fail to challenge its use. Townsend, 328 F.3d at 518.

Plaintiffs also argue that the defense does not apply here because "the necessary factual findings were not made, in writing, by the head of a public agency or their designee." (Mot. at 10 (citing 28 C.F.R. §§ 35.149, 35.150).) This argument is equally unavailing. Section 35.150(a)(3) may create a procedural requirement that the head of a department make written findings that a change would result in a fundamental alteration. However, there is no indication that a department head's failure to do so harms particular disabled

individuals, in a way that Title II aims to prevent or redress. See Ability Ctr. of Greater Toledo v. City of Sandusky, 385 F.3d 901, 913-15 (6th Cir. 2004) (holding no private action exists to enforce § 35.150(d)).

E. Dorothy Martin's Emotional Distress Damages

Plaintiffs assert that "Dorothy Martin may recover for her own emotional distress suffered during her lifetime, because the California law extinguishing emotional distress damages is inherently hostile to the remedial and deterrent policies underlying § 1983." (Mot. at 12.) However, the court entered judgment for defendants on the § 1983, equal protection claim. As discussed below, the court declines now to reverse course and enter judgment for plaintiff Dorothy Martin on this claim. This issue therefore is moot. Moreover, were it not, and as the parties are well aware, the court has previously addressed this precise issue in another case and found that the remedies provided by California law are not contrary to the purposes of § 1983. Venerable v. City of Sacramento, 185 F.Supp.2d 1128, 1133 (E.D. Cal. 2002).

F. Mary Martin's Financial and Emotional Distress Damages

Plaintiffs argue that "Mary Martin may also recover for her own financial damages and emotional distress under the ADA and the Rehabilitation Act." (Mot. at 13.) Mary Martin asserts that she has "been directly and personally aggrieved and damaged by Defendants' conduct." (Pls' Compl. ¶ 33.) According to Mary Martin, she was financially and emotionally

burdened with the care of her ailing mother because the VHCs would not admit her.

In certain limited circumstances, non-disabled individuals may claim "associational" discrimination, giving them standing to sue under the ADA and the Rehabilitation Act. Innovative Health Sys. v. City of White Plains, 117 F.3d 37, 46-47 (2d Cir. 1997) (overruled on other grounds). However, a non-disabled plaintiff must still show that she "suffered a specific, separate, and direct injury to [herself] caused by defendant's actions." Glass v. Hillsboro Sch. Dist., 142 F.Supp.2d 1286, 1288 (D. Or. 2001). Although there are few opinions on this issue, it appears that courts do not permit a caretaker or relative to bring a claim on his or her own behalf because of discomfort, distress, or loss due to the denial of benefits to some dependent loved one. See, e.g, Simenson v. Hoffman, 1995 WL 631084 (N.D. Ill. 1995) (no separate claim where doctor "yelled that he would not treat 'that sick child'" in presence of parents); Niemeier v. Tri-State, 2000 WL 1222207 (N.D. Ill. 2000) (husband may not claim damages because of denial of fertility treatment to wife). Though Mary Martin allegedly suffered financial loss and emotional distress, she did not have a separate right to CDVA's services. Her attempt to gain access to the VHC related solely to her mother's care. Therefore, the court finds that she does not have independent standing to sue under the ADA and the Rehabilitation Act.

G. Equal Protection

Plaintiffs claim that they are "entitled to judgment as a matter of law on their § 1983 claims because the policies are irrational and facially discriminatory, and

were applied (or at least sanctioned) knowingly and intentionally by the individual Defendants, with (at least) reckless disregard. Facially discriminatory admissions *per se* have no rational basis, and thus cannot pass muster in the Court's equal protection analysis." (Mot. at 13-14.) The court granted judgment to defendants on the equal protection claim before the case was submitted to the jury.

As already discussed above, a reasonable jury could conclude that the Department's policies were not facially discriminatory. Even if they were, disability does not constitute a suspect classification under the Equal Protection Clause. Does 1-5 v. Chandler, 83 F.3d 1150, 1155 (9th Cir. 1996). Review is under the rational basis standard, a highly deferential standard that puts the burden on the plaintiff to negate every conceivable basis that might support the action. Rui One Corp. v. Berkley, 371 F.3d 1137, 1155 (9th Cir. 2004). As discussed above, the Department has presented evidence that it denied admission to Dorothy Martin because it did not have the resources to care for her. A reasonable jury could conclude that plaintiffs did not present sufficient evidence to negate this assertion. Therefore, the court denies plaintiffs' motion for judgment on this issue.

H. Mary Martin's Standing under § 1983

Plaintiffs claim that "Mary Martin also has standing to bring her own claims for damages under 42 U.S.C. § 1983. (Mot. at 15.) However, this issue is moot given the discussion above.

I. Intentional Infliction of Emotional Distress ("IIED")

Plaintiffs claim "that they are entitled to recover under a theory of [IIED], because Defendants' facially discriminatory policies were, by definition, intentional discrimination." (Mot. at 16.) The court granted judgment to defendants on the IIED claim before the case was submitted to the jury.

The elements of an IIED claim in California are: (1) "[e]xtreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the potential for causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." KOVR-TV, Inc. v. Superior Court, 31 Cal.App.4th 1023, 1028 (1995). "Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." Id. (citation omitted). Plaintiffs assert that intentional discrimination is *per se* outrageous conduct. (Mot. at 16.)

As discussed above, the Department introduced sufficient evidence at trial that it did not discriminate, intentionally or otherwise, against Dorothy Martin based on her disability. A jury could reasonably find that the Department's decision to deny admission to Dorothy Martin was not outrageous or extreme. Indeed, a jury could find that the Department's decision was reasonable under the circumstances. Therefore, the court denies plaintiffs' motion for judgment on this claim.

J. Negligent Infliction of Emotional Distress ("NIED")

Plaintiffs claim that they "are also entitled to judgment as a matter of law under a theory of negligent infliction of emotional distress." (Mot. at 16.) The court also granted judgment to defendants on this claim before the case was submitted to the jury.

"The traditional elements of duty, breach of duty, causation, and damages apply" to an NIED cause of action. Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc., 48 Cal.3d 583, 588 (1989). "Whether a defendant owes a duty of care . . . depends upon the foreseeability of the risk and upon a weighing of policy considerations for and against imposition of liability." Id. In general, friends and family members may not bring an NIED claim because of the emotional suffering they incur as a result of injury to another. Such a claim "has been permitted in two types of situations, referred to as 'bystander' and 'direct victim' cases." Ess v. Eskaton Props., Inc., 97 Cal.App.4th 120, 126-27 (2002) (citing Burgess v. Superior Court, 2 Cal.4th 1064, 1072 (1992)).

Recovery in a bystander case requires Mary Martin to prove that she: (1) is closely related to the victim; (2) was present at the scene of the injury-producing event at the time it occurred and knew that the victim was being injured; and (3) suffered emotional distress beyond what a disinterested witness would likely suffer. Thing v. la Chusa, 48 Cal.3d 644, 647 (1989).

In typical bystander cases, the plaintiff has suffered a contemporaneous awareness of a sudden accident or injury-causing event. See e.g., Hedlund v.

Superior Court, 34 Cal.3d 695, 706 (1983) (son recovers when seated next to mother who was shot).

Mary Martin has not alleged that she suffered a similar type of contemporaneous awareness of an injury-causing event. She has not produced evidence that her mother's health deteriorated suddenly because she was not admitted to one of the VHCs. Rather, Mary Martin claims that she suffered emotional distress because she "was left with the responsibility of locating, obtaining, overseeing and paying for alternative care for Dorothy." (Pls.' Trial Br. at 20.) This is not the type of emotional distress claim permitted under a bystander theory of recovery. Therefore, the Department did not owe Mary Martin a duty under the bystander theory of liability.

To recover as a direct victim, the plaintiff must be a patient of the defendant caregiver. Ess v. Eskaton Props., Inc., 97 Cal.App.4th 120, 128 (2002). A familial relationship with the injured party alone is not sufficient to support a claim. Id. (sister of injured nursing home patient has no cause of action even though sister was responsible for the placement). The Department owed a duty to Dorothy Martin, not to her daughter.

Even if the Department owed Mary Martin a duty, the jury could have concluded based on the evidence presented that the Department did not breach that duty. As discussed previously, defense witnesses testified repeatedly that the VHCs only denied Dorothy Martin admission because they did not have the resources to care for her. A reasonable jury could conclude from that testimony that the Department's

actions were unavoidable and not negligent. Therefore, plaintiffs' motion for judgment on this claim is denied.

II. Motion for New Trial

Plaintiffs raise twenty-two arguments in support of their motion for new trial. Each argument is discussed under a separate heading below.

A. Instruction #14: "Lowest Level of Care"

Plaintiffs claim that:

> [t]he Court committed a prejudicial error of law in instructing the jury in its instruction #14 that "You should determine the lowest level of care, if any, for which Dorothy Martin was a 'qualified individual.' She would have qualified for a certain level of care if she met the essential eligibility requirements for that level of care at the time she applied."

(Mot. at 19.)

This instruction was not erroneous. In an ADA and Rehabilitation Act claim, the jury must determine whether the individual "satisfies all of a program's requirements other than those that are unreasonable and discriminatory." Jacobson v. Delta Airlines, Inc., 742 F.2d 1202, 1205 (9th Cir. 1984). The levels of care were included among the VHCs' requirements. (Pls.' Exs. 50-52.) The VHCs had the authority to create these requirements under Cal. Mil. & Vet. Code § 1044. Furthermore, as discussed previously, a reasonable jury could have determined that these requirements were not unreasonable or

discriminatory. Therefore, consideration of the levels of care was necessary in determining whether Dorothy Martin was a "qualified individual." See Grubbs v. Med. Facilities of Am., Inc., 879 F.Supp. 588, 591 (W.D.Va. 1995) (holding that, when plaintiff could not meet the requirements for the level of care she required, she was not "otherwise qualified"). Moreover, instructing the jury to consider the lowest level of care for which Dorothy Martin was eligible was an instruction that favored plaintiff's contention that she was qualified for the RCFE with modest accommodations. Presumably this is why plaintiffs did not object to the instruction at trial and should not be heard to do so now.[9]

B. Instruction #14: "Reasonable Accommodation or Modification"

Plaintiffs assert that:

> [t]he Court committed a prejudicial error of law in instructing the jury in instruction #14 that "A reasonable accommodation or modification may include . . . minor alterations to physical facilities." This instruction misstated the applicable law, because reasonable accommodations are not limited to minor alterations to physical facilities.

(Mot. at 19-20.)

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[9] Because the court does not have a transcript, it must rely on its recollection of whether objection was made at the jury instruction conference.

Plaintiffs mischaracterize the instruction. The instruction included several other possible "reasonable accommodations," such as "job restructuring, modifying an application process, acquisition or modification of equipment or devices, [and] adjustments to training" (all excluded by plaintiffs' elipses). Moreover, the instruction did not limit it to these possibilities by using the words "*may* include," not "only include." And, again, the court recalls no objection to this instruction at trial on this ground.

C. Instruction #15: Considering the "Level of Care"

Plaintiffs claim that "[t]he Court committed a prejudicial error of law in instructing the jury in its instruction #15 that it should consider 'the Department's decision to deny admittance to a level of care, for which Dorothy Martin was qualified . . .'" (Mot. at 20.) As discussed above, the instructions regarding the levels of care were proper and necessary for this claim.

D. Instruction #15: Disability as a "Motivating" Factor

Plaintiffs claim that "[t]he Court committed a prejudicial error of law in instructing the jury in its instruction # 15 that " . . . if you find that the Department's standards promote another purpose, the standards may not be discriminatory." (Mot. at 20.) Plaintiffs assert that "all that is required under the ADA is that the disability be a 'motivating factor' rather than the 'sole' factor." (JMOL Reply at 3.) However, plaintiffs never stated this as a ground of objection to the instructions until its reply brief in support of its renewed motion for JMOL and new trial. Moreover, in their Proposed Jury Instruction #18,

plaintiffs state that the plaintiff's disability must be "*the* determining factor," rather than "*a*" determining factor. Thus, plaintiffs cannot assert this argument now. See Fed. R. Civ. P. 51(c); Ayuyu v. Tagabuel, 284 F.3d 1023, 1026 (9th Cir. 2002). Further, plaintiffs' Proposed Jury Instruction #36 states that "plaintiffs claim that Dorothy Martin's disability was the sole reason for the defendant's decision not to provide benefits and services to Dorothy Martin." This seemed to be plaintiffs' theory of the case from the beginning of the litigation. Plaintiffs never provided a mixed motive instruction and it would be unfair to now introduce this new theory that may or may not apply. Finally, the language under scrutiny does not actually address the issue because it can be understood consistently with plaintiffs' position. This is probably why, to the court's best recollection, no specific objection was made to this language at trial.

E. Instruction #15: "Some Other Non-Discriminatory Reason"

Under the same rationale discussed in Section D, plaintiffs assert that "[t]he Court committed a prejudicial error of law in instructing the jury in its instruction #15: " . . . if you find that Dorothy Martin was treated differently for some other non-discriminatory reason, the defendant did not engage in discrimination because of her disability and you should find in favor of defendant." (Mot. at 20.) For the reasons discussed above, plaintiffs cannot assert this argument now.

F. Instruction #17: Defense of Undue Hardship

Plaintiffs claim that "[t]he Court committed a prejudicial error of law in instructing the jury in its instruction #17 about the defense of undue hardship, which was not available to Defendant as a matter of law. (Nor is undue hardship an absolute defense, as portrayed in the Court's instruction.)" (Mot. at 20.)

Plaintiffs' argument is flawed among other reasons because the jury never had to consider the defense. As demonstrated on the jury verdict form, the jury concluded that the Department did not discriminate against Dorothy Martin by reason of her disability. (Verdict Form, Docket # 155.) The verdict form specifically stated that if the jury made this finding, it should not go on to answer question #2 which asked the jury if the Department had proven any of its defenses. (Id.) Therefore, even if it were erroneous to instruct on undue hardship, such an error was harmless and not grounds for a new trial.

G. Instruction #21: Compensatory Damages

Plaintiffs assert that:

> [t]he Court committed a prejudicial error of law in instructing the jury in its instruction #21 that "An award of compensatory damages should be limited to the net cost of the Estate of Dorothy Martin of any services she was required to obtain as a consequence of her denial of admission to a Veterans Home."

(Mot. at 21.) However, the jury never considered damages because it concluded that the Department did

not violate the ADA or the Rehabilitation Act. Therefore, any error would be harmless.

H. Instruction #21: Emotional Distress Damages

Plaintiffs assert that "[t]he Court committed a prejudicial error of law in instructing the jury in its instruction #21 that 'you may not award any damages for emotional distress experienced by Dorothy Martin or Mary Martin.'" (Mot. at 21.) Again, because the jury never considered damages, any error would be harmless. Also, as discussed earlier, plaintiffs' claims for IIED and NIED were properly dismissed from the case.

I. Consolidation of Claims Under the ADA and Rehabilitation Act

Plaintiffs claim that "[t]he Court committed a prejudicial error of law by consolidating Plaintiffs' claims under the ADA and the Rehab Act, rather than instructing on and submitting each claim to the jury separately." (Mot. at 21.)

The requisite elements of the ADA and the Rehabilitation Act are essentially identical, and the Ninth Circuit has construed them to be co-extensive. Sanchez v. Johnson, 416 F.3d 1051, 1062 (9th Cir. 2005). Moreover, plaintiffs never asserted this objection when given the opportunity before the jury retired to deliberate. All parties, particularly plaintiffs, are assisted when the jury instructions are as straightforward as possible. Thus, consolidating the claims for purposes of instruction was proper and helped to simplify the jury's consideration of the evidence.

J. Failure to Instruct on § 1983 Claim

Plaintiffs claim that "[t]he Court committed a prejudicial error of law by refusing to instruct the jury on Plaintiffs' claim under 42 U.S.C. § 1983." (Mot. at 21.) As discussed above, plaintiffs did not present sufficient evidence to support a § 1983 claim. Therefore, it was not erroneous to refuse to instruct the jury on this claim.

K. Failure to Instruct on State Law Emotional Distress Claims

Plaintiffs claim that "[t]he Court committed a prejudicial error of law by refusing to instruct the jury on Plaintiffs' state law emotional distress claims." (Mot. at 21-22.) As discussed above, plaintiffs did not present sufficient evidence to support an NIED or IIED claim. Therefore, it was not erroneous to refuse to instruct the jury on these claims.

L. Mary Martin's Standing

Plaintiffs assert that "[t]he Court committed a prejudicial error of law by not permitting Plaintiff Mary Martin to recover any damages under any theory alleged in the Complaint or proven at trial." (Mot. at 22.) As noted previously, Mary Martin did not have standing to recover damages. Moreover, even if the court erred, the jury never reached the issue of damages because it found that the Department did not violate the ADA or the Rehabilitation Act. (See Verdict Form, Docket # 155.)

M. Removal of Individual Defendants from Consideration

Plaintiffs argue that "[t]he Court committed a prejudicial error of law by removing individual defendants Bruce Thiesen, George Andries, Jr., and Marcella McCormack from consideration by the jury as to their liability." (Mot. at 22.)

The court already disposed of this issue regarding the ADA and Rehabilitation Act claims in its July 21, 2003 Order as follows:

> [p]laintiffs may not bring ADA and Rehabilitation Act claims against CDVA officers in their individual capacities, because both statutes are directed at the actions of public entities only. Miranda B. v. Kitzhaber, ---- F.3d -- -, 2003 WL 21078049, *5 n.7 (9th Cir. 2003) (distinguishing ADA suits against state officers in their individual capacities from its holding that plaintiff could obtain injunctive relief under ADA against state officers in their official capacities); Garcia v. S.U.N.Y. Health Sciences Center, 280 F.3d 98 (2d Cir. 2001) ("[N]either Title II of the ADA nor § 504 of the Rehabilitation Act provides for individual capacity suits against state officials."); Alsbrook v. City of Maumell, 184 F.3d 999, 1005 n.8 (8th Cir. 1999) ("['Public entity'] as it is defined within the [ADA], does not include individuals.").

(7/21/2003 Order at 7-8). Accordingly, the court dismissed plaintiffs' ADA and Rehabilitation Act

claims against the CDVA officers named in their individual capacities. (Id. at 8.)

Thus, at the time of trial, the individual defendants only remained as to the equal protection and negligence claims. As discussed above, these claims were properly dismissed as to all defendants.

N. Failure to Give Plaintiffs' Proposed Instructions

Plaintiffs assert that:

> "The Court committed prejudicial errors of law by refusing to give the following instructions, as requested by Plaintiffs: Plaintiffs' proposed instructions 17, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 34, 35, 36, 37 and 39-52. Plaintiffs' proposed instructions (the complete set numbered 1-52), submitted in a timely manner and accurately stating the relevant law, were almost completely disregarded by the Court, who instead substituted its own set of instructions presented to counsel at the conclusion of trial, the very morning the jury was instructed."

(Mot. at 22.)

Despite plaintiffs' assertions, the court did not disregard plaintiffs' proposed instructions, as it used much of the language provided by plaintiffs to create the final instructions presented to the jury. A fair review of plaintiffs' instructions shows that they were not ready for delivery to a jury. It was the court's responsibility to pull together, at considerable effort, a set of instructions that would make sense to a lay

jury. Also, the court has no current recollection of the parties protesting that they had inadequate time to review the final instructions or requesting additional time to review them and make objection.

Plaintiffs have not presented any persuasive argument as to why the court's jury instructions, as a whole, were misleading or misstate the law. Instruction 10 cited the exact provisions from the ADA and the Rehabilitation Act which explain the prohibition against discriminating on the basis of disability. Instruction 11 listed the four elements that the plaintiff must prove to establish ADA and Rehabilitation Act claims. While plaintiffs claim that asking the jury to examine the levels of care was confusing, doing so was necessary to properly evaluate the claim.

Plaintiffs also argue for the first time in their reply brief that the instructions should have: (1) distinguished between levels of care for residents versus applicants; and (2) used the term "dementia" rather than "Alzheimer's." However, these arguments are untimely and should not and cannot be raised now. Fed. R. Civ. P. 51(c).

O. Admitting Dr. Arnott's Testimony

Plaintiffs claim that "[t]he Court committed prejudicial errors of law in improperly admitting the testimony of Dr. Arnott on the matter of Dorothy Martin's condition and care needs." (Mot. at 23.)

Plaintiffs first raised this issue in Motion in Limine #1. They asserted that Dorothy Martin's care needs were irrelevant because this information was not

considered by the VHCs at the time they reviewed Dorothy Martin's application. The court denied the motion finding that Dorothy Martin's medical history was at least relevant to her claim for damages. This ruling is correct; her claim for damages would have depended, at least in part, on what she would have paid for services had she been admitted to the VHC versus what she paid on the outside. The parties took very different positions on Dorothy Martin's precise care needs when she applied and thereafter. Moreover, the testimony was relevant to a central issue in the case: what level of care was appropriate for Dorothy Martin when she applied? The subsequent medical history is relevant to an assessment of her medical condition at an earlier point in time and to the credibility of witnesses testifying to that condition. Accordingly, the decision to admit Dr. Arnott's testimony was proper.

P. Admitting Exhibits 1-18 on Dorothy Martin's Needs

Plaintiffs assert that "[t]he Court committed prejudicial errors of law in improperly admitting Defendants' Exhibits # 1-18, on the matter of Dorothy Martin's condition and care needs." (Mot. at 23.) However, the court's decision was proper for the reasons discussed in Section O.

Q. Refusing to Admit Bob Taylor's Testimony

Plaintiffs claim that "[t]he Court committed prejudicial errors of law in improperly refusing to admit testimony and documentary evidence regarding the statements of Bob Taylor to the effect that the Veterans Home of California did not accept applicants with Alzheimer's disease." (Mot. at 23.)

Bob Taylor was a County Veterans Service Officer assigned to the Yountville VHC in 1998. Mary Martin sought to testify that Taylor told her in 1998 that "the VHC does not and would not admit applicants with Alzheimer's disease." (Def.'s Mot. in Limine #3 at 2.) This statement would be offered for the truth of the matter stated. Defendants moved to exclude any statements made by Taylor because the statements were hearsay and not admissible as party-opponent admissions. (Id.) More specifically, they asserted that: (1) Taylor was not authorized by defendants to make statements regarding admissions; and (2) the statements were not within the scope of Taylor's agency or employment. (Id. at 3.) Plaintiffs had the burden to prove otherwise. See Brenenman v. Kennecott Corp., 799 F.2d 470, 473 (9th Cir. 1986) ("Rule 801(d)(2)(D) requires the proffering party to lay a foundation to show that an otherwise excludable statement relates to a matter within the scope of the agent's employment.").

In opposition, plaintiffs asserted that Taylor's statements were indeed party-opponent admissions. (Opp'n to Def.'s Mot. in Limine #3 at 2.) They claimed their exhibits showed that the Department "routinely refers applicants and their families to [County Veterans Service Officers ("CSVOs")] (such as Taylor) for assistance with the admissions process." (Id. at 3 (citing Pls.' Exs. 42, 144(f).) Upon hearing these arguments, the court allowed the Department to submit additional evidence to prove Taylor was not authorized to discuss admissions, and the court held an additional hearing on the issue. (10/11/2006 Tr. of Mots. in Limine at 12.)

The Department then filed the declaration of Marcella McCormack, the Administrator of the Yountville Home. (McCormack Decl. at 2.) McCormack stated that Veterans Services Representatives like Bob Taylor are not: (1) responsible for addressing questions from prospective members regarding admissions polices; (2) part of the Admissions Screening Committee; or (3) briefed as to admissions policy. (Id.) Attached to her declaration was a duty statement stating that Taylor's duties included, among other things: (1) interviewing and counseling Veterans Home members on federal and state veterans benefits; (2) assisting in application completion; and (3) participating in member admissions screening. (Id. Ex. 2.)

Ultimately, the court decided to exclude the evidence. Nevertheless, the court's current recollection is that much of the testimony came in anyway without objection. Even if it did not come in, and the court erred in excluding it, the error would be non-prejudicial. The parties have agreed that the VHCs did not admit new Alzheimer's patients with severe dementia; indeed, the VHCs did not admit any veterans who required placement in the SNF. Plaintiffs may have had the theory that the VHCs did not admit Alzheimer's patients whose symptoms were so mild that they would qualify for the RCFE. But Taylor's cryptic statements were not sufficiently precise to be probative of this issue.

R. Refusing to Admit Plaintiffs' Exhibits 130-135

Plaintiffs assert that "[t]he Court committed prejudicial errors of law in improperly refusing to admit Plaintiffs' Exhibits 130-135 . . . after these

exhibits had already been presented during the trial, without objection by Defendants." (Mot. at 23.)

Plaintiffs' exhibits 130-135 include legislative history for bills AB 324 (1997) and SB 630 (1999). Both of these bills address the needs of the Veterans Homes. Specifically, AB 324 sets out to ensure that veterans' homes meet "the staffing, licensure, and other requirements necessary to provide health care and related services to members of the home who are afflicted with Alzheimer's Disease or other related dementia diseases." (Pls.' Ex. 132.) SB 630 authorizes a financing plan to fund construction or renovation of the veterans' homes. (Pls.' Ex. 135.)

The legislative history for each of the bills states that the veterans' homes do not accept new Alzheimer's patients. Hearing notes for AB 324 from the Assembly Committee on Governmental Organization state that the bill's author "contends that 'If a person is already in a Veterans' Home and develops dementia, he/she can stay. But if you have a dementia related disease and want to get in a Vet home, you cannot.'" (Pls.' Ex. 132.) The notes also say that, "[a]ccording to the DVA, the Homes do not currently admit veterans with Alzheimer's because they do not have the capacity to adequately provide the appropriate care." (Id.) Hearing notes from the Senate Committee on Veterans Affairs state that "[t]he Veterans Department does not at present admit veterans with Alzheimer's disease to the home at Yountville, stating that they do not currently have the capacity to provide adequate care." (Pls.' Ex. 134.) Finally, the bill text of SB 630 states that "[t]he general policy of the department is to not accept veterans into existing veterans' homes who suffer from

Alzheimer's disease or other diseases causing dementia." (Pls.' Ex. 135.)

These exhibits contain inadmissible hearsay. Rule 803(8) provides an exception for public records and reports. However, plaintiffs must prove that the facts stated in the documents were "within the personal knowledge and observation of the recording official or his subordinates." Colvin v. United States, 479 F.2d 998, 1003 (9th Cir. 1973)). "Since the official documents are a substitute for the personal appearance of the official in court, it is generally held that such documents, to be admissible, must concern matters to which the official could testify if he were called to the witness stand." Indep. Iron Works, Inc. v. U.S. Steel Corp., 322 F.2d 656, 672 (9th Cir. 1963). "Reports based upon general investigations and upon information gleaned second hand from random sources must be excluded." Id.

Three of the four statements above state that the information came from another source – either the Department or the author of the bill. The fourth statement does not refer to any source at all. At trial, the Department adamantly denied that it had the policy it supposedly had admitted to. Because plaintiffs did not present any evidence or make any proffer showing that the information was within the recording official's personal knowledge, or the source of that knowledge, the court found that the exhibits were hearsay. On reconsideration, this ruling appears correct.

S. Exclusion of Plaintiffs' Exhibit 156

Plaintiffs assert that "[t]he Court committed prejudicial errors of law in improperly excluding Plaintiffs' Proposed Exhibit 156 and precluding Plaintiffs from eliciting any testimony about the Department's change to its 75% restriction." (Mot. at 24.)

Section 503 of the California Code of Regulations governs admissions to the SNF at Veterans Homes. This section was amended on February 16, 2005 and changed the standard of admission. The old version precluded outside admission unless the occupancy rate fell below 75%. The amended version precludes direct admission if the admission would prevent a current resident of the Veterans Homes from entering the SNF. The Department sought to exclude evidence of the change because it was: (1) irrelevant since the changes were made long after Dorothy Martin passed away; (2) an inadmissible subsequent remedial measure under Rule 407; and (3) prejudicial. (Def.'s Mot. in Limine #2 at 2.)

In opposition, plaintiffs asserted that the evidence should be admitted under the feasibility exception. (Opp'n to Def.'s Mot. in Limine #2 at 2.) However, Rule 407 states that the feasibility exception only applies if feasibility is controverted, which it was not. (Def.'s Mot. in Limine #2 at 2.)

Alternatively, plaintiffs asserted that the impeachment exception should apply. (Opp'n to Def.'s Mot. in Limine #2 at 2.) They contended that the Department has repeatedly claimed that "the 75% restriction was reasonable, necessary, and had a

rational basis." (Id.) However, when the Department changed the law, it stated to the California Office of Administrative Law that the regulation "is considered by the Department to be arbitrary and too severe a restriction, and is not in the best interests of the veterans of California . . . ." (Id.) This, they argued, could impeach the Department's previous claims and demonstrate that the 75% rule was unnecessary and had no rational basis. (Id.)

During the motion in limine hearing, the court ruled that the evidence was: (1) not relevant because of the passage of time; and (2) barred by the policy of Evidence Rule 407. (Tr. at 4.)

Rule 407 provides that "evidence of [] subsequent [remedial] measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction." Fed. R. Evid. 407. This rule arises from the policy that defendants should be encouraged to make improvements without being afraid that those improvements will be used as evidence against them. Albrecht v. Baltimore & Ohio R.R. Co., 80 F.2d 329, 332 (4th Cir. 1987).

The evidence that plaintiffs' hoped to introduce regarding the change in the 75% rule is evidence of a subsequent remedial measure that does not fall under the impeachment exception. The Department may well have believed that the 75% rule was reasonable and appropriate at the time it reviewed Dorothy Martin's application. Evidence that the Department subsequently changed its view and decided that the rule was arbitrary and too severe a restriction does not impeach the Department's previous position that the

restriction was reasonable. The two views can co-exist. Furthermore, to permit evidence of policy changes and the reasons given, under the impeachment exception, would contradict the policy of Rule 407, particularly as applied to a public agency which should not be deterred from changing its policies and explaining those changes to the citizenry. Accordingly, the court does not find that it misapplied Rule 407 or abused discretion.

T. Allowing Defense Counsel "to Improperly Joke with the Judge"

Plaintiffs argue that:

> [t]he Court committed a prejudicial error of law by permitting Defendants' attorney, Mr. McCardle, to improperly joke with the judge during his closing argument. Mr. McCardle was "attempting to curry the favor of the jury by complimenting them, stating that they often had more 'common sense' than the attorneys or the judge, specifically referring and gesturing to the judge." Instead of rebuking counsel for this attempt to ingratiate himself with the jury and portray himself as friendly with the Court, the Court chuckled and allowed Mr. McCardle to continue his presentation uninterrupted. This exchange gave the jury the impression that the Judge and Defendants were on the same team.

(Mot. at 24.)

The court has no recollection of chuckling or smiling but will assume that it did. Surely the court smiled at plaintiffs' counsel at some point during the

trial and closing arguments. Indeed, all counsel treated one another and the court with unfailing courtesy throughout the trial in the presence of the jury. There was no reason to rebuke defense counsel for this offhand reference to the court.

U. Defendants' Motion for Judgment as a Matter of Law

Plaintiffs assert that:

> [d]espite expressing concerns on the record over fairness and the improper timing of the issues raised in Defendants' Motion for Judgment as a Matter of Law, the Court ultimately granted Defendants virtually everything they requested in their motion. When all was said and done, the Court failed to give due weight to the prejudice to Plaintiffs and did not preclude Defendants from bringing any claim they could think of, and several arguments actually suggested by the Court, many for the first time.

(Mot. at 24.) Plaintiffs claim that this "further reflect[s] that the Court appeared to craft, and virtually compel, the conclusion of this case in favor of Defendants." (Id. at 26.) Plaintiffs also claim that defendants waived their rights to assert the arguments made in the motion for JMOL because the arguments were affirmative defenses. (Opp'n to Def.'s Mot. for JMOL at 3 (citing 999 v. C.I.T. Corp., 776 F.2d 866, 871 (9th Cir. 1985); 389 Orange Street Partners v. Arnold, 179 F.3d 656, 663, n.3 (9th Cir. 1999) (citing Grabner v. Willys Motors, Inc., 282 F.2d 644, 646 (9th Cir. 1960)); Brannan v. United Student Aid Funds,

Inc., 94 F.3d 1260, 1266 (9th Cir. 1996); Fed. R. Civ. P. 8(c)).

Although the Department sought to dismiss several of plaintiffs' claims in its motion for JMOL, the court only dismissed some of the claims. Those are the claims that are relevant here. The court dismissed: (1) the ADA, Rehabilitation Act, and equal protection claims raised by Mary Martin because she did not have standing; (2) the compensatory damages claims for violations of the ADA and the Rehabilitation Act because plaintiffs did not provide evidence of intentional discrimination; (3) the equal protection claim raised by Dorothy Martin's estate because plaintiffs failed to show that the Department had no rational basis for its actions; (4) the emotional distress claims raised by Dorothy Martin's estate because they are barred by California's survival statute; and (5) the emotional distress claims raised by Mary Martin because the Department did not owe her a duty. The court's dismissal of these claims was proper. Indeed, the standing issue raised a question of jurisdiction. While it was unfortunate that the defendants did not make appropriate pre-trial motions to dismiss, there was no prejudice to plaintiffs that the motions were made at trial. There was no waiver by the Department because the arguments advanced were not in the nature of affirmative defenses. The court could not permit legally baseless claims to go to the jury. However, Dorothy Martin's disability claim, which is the essence of the case, did go forward and was fully and fairly presented.

V. The Verdict

Finally, plaintiffs assert that "[t]he verdict is against the great weight of the evidence." However, the discussion above regarding the motion for JMOL demonstrates that the verdict was clearly not against the weight of the evidence.

III. Bill of Costs

Defendants seek to recover $7,865.91 in costs. Plaintiffs assert that defendants are barred from recovering their costs under Brown v. Lucky Stores, Inc., 246 F.3d 1182 (9th Cir. 2001). For the reasons stated below, the court denies the Department's claim for costs for the ADA claim and grants its claim for costs for the Rehabilitation Act, civil rights, and emotional distress claims.

A. ADA

Fed. R. Civ. P. 54(d)(1) provides that a prevailing party is entitled to recover its costs absent a contrary direction from the court, the rules, or a federal statute. In Brown, the Ninth Circuit held that costs should be awarded to a prevailing defendant in an ADA action only if the action "was frivolous, unreasonable, or without foundation." 246 F.3d at 1190 (citing Christiansburg Garment Co. v. A. Teichert & Son, Inc., 127 F.3d 1150, 1154 (9th Cir. 1997)). Because this action was not frivolous, it follows that defendants cannot recover costs incurred defending against the ADA claim. The Department concedes this point with regard to Dorothy Martin's ADA claim. However, it asserts that Mary Martin's ADA claim was

unreasonable and without foundation because she did not have standing. (Reply at 4.)

A claim is unreasonable and without foundation if "a reasonable inquiry into the applicable facts and law before filing their case they would have discovered the insufficiency of their . . . claim." Margolis v. Ryan, 140 F.3d 850, 854 (9th Cir. 1998). Under this standard, Mary Martin's ADA claim was not frivolous. In certain circumstances, non-disabled individuals may claim "associational" discrimination, giving them standing to sue under the ADA. Innovative Health Sys. v. City of White Plains, 117 F.3d 37, 46-47 (2d Cir. 1997) (overruled on other grounds). In those cases, the non-disabled individual must show that she "suffered a specific, separate, and direct injury to [herself] caused by defendant's actions." Glass v. Hillsboro Sch. Dist., 142 F.Supp.2d 1286, 1288 (D. Or. 2001). Plaintiffs' reasonable inquiry into the facts and law could have led them to conclude that Mary Martin suffered such an injury because she had to pay for alternate care for her mother. Although her claim is ultimately not supportable, "very few published opinions address this issue," Glass, 142 F.Supp.2d at 1287 n.2. Therefore, Mary Martin's ADA claim was not frivolous. The court notes that defendants must not have deemed the claim frivolous during the period for pre-trial motions since no motion to dismiss Mary Martin's ADA claim on this ground was made. Accordingly, the court denies the Department's request for costs on plaintiffs' ADA claim.

B. Rehabilitation Act

Plaintiffs claim that the Christiansburg test should also apply to an award of costs under the

Rehabilitation Act since the Act also treats attorney's fees and costs as parallel. (Opp'n to Bill of Costs at 2.) However, plaintiffs point to no precedent, nor could the court find any, to support this contention. Indeed, the language of the Rehabilitation Act seems to support the opposite conclusion. The Rehabilitation Act attorney's fee provision allows the prevailing party "a reasonable attorney's fee as part of the costs," 29 U.S.C. § 794a(b), whereas the ADA allows the prevailing party "a reasonable attorney's fee, including litigation expenses, and costs." Thus, under the Rehabilitation Act, attorney's fees are considered "part of the costs" rather than a separate recovery.

In that regard, the Rehabilitation Act is more similar to the attorney's fee provision for Title VII, which also allows the prevailing party "a reasonable attorney's fee . . . as part of the costs." 42 U.S.C. § 2000e-5(k). In Title VII cases, the Christiansburg test does not apply to an award of costs, even though it applies to an award of attorney's fees. Nat'l Org. for Women v. Bank of Cal., 680 F.2d 1291, 1294 (9th Cir. 1982). The Ninth Circuit reasoned that "[t]here is no express statutory provision for applying Christiansburg to cost awards, and we see no reason to impose rigid limitations on the district court's discretion." Id. This same reasoning would seem to apply to an award of costs under Title II, given the similarity of language between the two statutes. See Halasz v. Univ. of New England, 821 F.Supp. 40, 42 (D. Me. 1993) ("[i]t is clear from the wording of section 794a(b), which permits attorney's fees as a discretionary element of costs, that Congress intended the costs of litigation to be awarded generally as a matter of course in Rehabilitation Act cases as they are under . . . Rule 54.").

In light of this case law, the court finds that Rule 54 rather than the Christiansburg test applies to an award of costs under the Rehabilitation Act. Accordingly, the Department's request for costs under this claim is granted.

C. Section 1983 and Emotional Distress Claims

Plaintiffs present no argument why Rule 54 should not also apply to its civil rights and emotional distress claims. Therefore, the court awards costs to the Department for these claims as well.

D. Apportionment of Costs

The award of costs "rests within the sound discretion of the trial judge." EEOC v. Pierce Packing Co., 669 F.2d 605, 609 (9th Cir. 1982). This case involved four main claims under the ADA, the Rehabilitation Act, Section 1983 and California tort law. However, the ADA claim was the central claim. Because the Department cannot recover costs for the ADA claim, and because it was the focus of the litigation, the court awards 50% of its total request, or $3,932.95.

IV.

For the reasons stated above, plaintiffs' motions for judgment as a matter of law and for new trial are DENIED. Defendants are awarded costs in the amount of $3,932.95.

IT IS SO ORDERED.

Dated: 8/31/2006

/s/ David F. Levi
DAVID F. LEVI
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CASE NO: 2:02-CV-02334-DFL-GGH

[Filed October 21, 2005]

ESTATE OF DOROTHY MARTIN, ET AL.,	)
	)
v.	)
	)
CALIFORNIA DEPARTMENT OF VETERANS AFFAIRS, ET AL.,	)
	)

JUDGMENT IN A CIVIL CASE

XX— **Jury Verdict.** This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE JURY VERDICT RENDERED 10/21/05

Jack L. Wagner
Clerk of the Court

ENTERED: **October 21, 2005**

by:/s/ – M. Caspar
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-16850

D.C. No. CV-02-02334-DFL
Eastern District of California, Sacramento

[Filed May 6, 2009]

ESTATE OF DOROTHY MARTIN; et al.,	)
	)
Plaintiffs - Appellants,	)
	)
v.	)
	)
CALIFORNIA DEPARTMENT OF VETERANS AFFAIRS, a California Public Corporation; et al.,	)
	)
Defendants - Appellees.	)
	)

ORDER

Before: WALLACE, PREGERSON, and GRABER, Circuit Judges.

Judges Wallace and Graber have vote to deny the petition for panel rehearing, and Judge Pregerson has voted to grant it. Judge Graber has voted to deny the

petition for rehearing en banc, and Judge Wallace has so recommended. Judge Pregerson has voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

The petition for panel rehearing and petition for rehearing en banc are DENIED.

APPENDIX E

United States Constitution, Amendment XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

29 U.S.C. § 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705 (20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

* * *

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be

extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

42 U.S.C. § 12101. Findings and purpose

(a) Findings

The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on

an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or

activities of a public entity, or be subjected to discrimination by any such entity.

Cal. Code of Civ. Proc. § 377.34 (Damages–deceased plaintiff)

In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.

Cal. Mil. & Vet. Code § 1012

(a) Except as provided in Section 1012.4, the home is for aged and disabled persons who served in the Armed Forces of the United States of America who were discharged or released from active duty under honorable conditions from service, who are eligible for hospitalization or domiciliary care in a veterans' facility in accordance with the rules and regulations of the United States Department of Veterans Affairs, and who are bona fide residents of this state at the time of application; and for the spouses of these persons if all of the following conditions, as are applicable, are satisfied:

(1) Space is available.

(2) Joint residency will be in the best interests of the home member, as determined by the administrator.

(3) The spouse is a bona fide resident of this state at the time of application for admission to the home and either is married to, and has resided with, the home member for at least one year, or is the widow or widower of a recipient of the Medal of Honor.

(4) The home member and spouse agree to pay the fees and charges for joint residency, or for a widow or widower, for the residency, that the administrator may establish.

(b) (1) Veterans who qualify for benefits under this chapter due to service during a time of war shall be given priority over veterans who qualify due to service during a time of peace.

(2) Veterans who qualify for benefits under this chapter who are recipients of the Medal of Honor shall be given priority over all other qualified veterans, regardless of the level of care required.

(c) A resident spouse may continue residence after the veteran's death.

(d) The property of the home shall be used for this purpose.

APPENDIX G

28 C.F.R. § 35.130(b)(1)

A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

28 C.F.R. § 35.130(b)(3)

A public entity may not, directly or through contractural or other arrangements, utilize criteria or methods of administration:

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities.

28 C.F.R. § 41.51 – General prohibitions against discrimination

(a) No qualified handicapped person, shall, on the basis of handicap, be excluded from participation in, be

denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance.

(b)(1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing

any aid, benefit, or service to beneficiaries of the recipient's program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A recipient may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap,

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or

(iii) That perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state.

* * *

38 C.F.R. § 18.404(b)(4)

A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration that:

(ii) Have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons.

38 C.F.R. § 18.410 Effect of State or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any State law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

38 C.F.R. § 18.452 Health and other social services.

(a) General. In providing health, or other social services or benefits, a recipient may not, on the basis of handicap:

(1) Deny a qualified handicapped person these benefits or services;

(2) Give a qualified handicapped person the opportunity to receive benefits or services that are not equal to those offered nonhandicapped persons.

(3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in Sec. 18.404(b)(2)) as the benefits or services provided to others;

(4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or

(5) Provide different or separate benefits or services to handicapped persons except where necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.